THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY
M. G. ELLISON,
ONE OF HIS MAJESTY'S COUNSEL.

1941

BELFAST.
PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING
FOR NORTHERN IRELAND.
1941.

REPRINTED 1965
OCEANA PUBLICATIONS NEW YORK
WILDY & SONS LONDON.

BIBL.
LONDIN.
UNIV.

BELFAST:
PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR NORTHERN IRELAND,
BY
R. CARSWELL & SON, LTD.,
QUEEN STREET

Lord Chief Justice:

The Right Hon. James Andrews.

Lords Justices of Appeal:

The Right Hon. Anthony Brutus Babington,
The Right Hon. Edward Sullivan Murphy.

Chancery Division:

The Hon. Robert Dick Megaw.

King's Bench Division:

The Right Hon. Thomas Watters Brown.

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CASES

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IN

NORTHERN IRELAND.

MARTIN v. MARTIN (1).

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Sept. 11. Oct. 31.

Divorce—Wife's petition on the ground of cruelty presented within three years after the date of marriage—Whether a case "of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent"—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 *Geo.* 6, *c.* 13), *sec.* 5.

A woman presented a petition for divorce on the ground of cruelty alone, before the expiration of three years from the date of the marriage, alleging that the case was one of exceptional hardship suffered by her, or of exceptional depravity on the part of the respondent. The acts of the respondent on which the petitioner relied as causing such hardship, or proving such depravity, were committed on four occasions, all during the petitioner's first pregnancy, and were as follows:—(1) he caught her by the hair and attempted to force open her mouth with the object of making her drink whiskey, and poured whiskey into her mouth, eyes and nose; (2) he attempted to make her accompany him to a motor cycle race by pulling her hair and twisting her nose and lips; (3) he hurt her arm severely by pinching and twisting it, kicked her and knocked her down, and when she was lying on the floor kicked her twice on the abdomen, caught her by the hair and dragged her upstairs; (4) he insisted on one occasion on having sexual intercourse with her against her wish, when she was ill.

(1) In the Court of Appeal before Babington and Murphy, L.JJ., and Megaw, J.

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Held, that the respondent treated the petitioner with cruelty, but that the case was not "one of exceptional hardship suffered by the petitioner, or of exceptional depravity on the part of the respondent" within the meaning of the Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 Geo. 6, c. 13), sec. 5, and that the Court could not pronounce a decree of divorce.

Decision of Andrews, L.C.J., affirmed.

This was an appeal from Andrews, L.C.J., who had refused to grant to the petitioner, the wife, a divorce on the ground of her husband's cruelty.

The facts as found by Andrews, L.C.J., were as follows:—The parties were married on 7th July, 1938. The petitioner who was then twenty-two years of age had previously been a secondary school teacher. The respondent, who was then thirty-one years of age, was a medical doctor.

Within a very few weeks after the marriage the petitioner was pregnant, as both parties were aware, and as a consequence, she was distressed and suffered from sickness. The respondent failed or refused to appreciate the petitioner's condition and it was almost entirely because of his inconsiderate and unsympathetic attitude to her, and his failure to make allowances for her condition, that differences arose between them.

The first act of cruelty complained of occurred during the second week in September, 1938, when the petitioner as a consequence of her pregnancy was dull and drowsy. The respondent, annoyed by her dullness, and possibly in an endeavour to remedy it, caught her by the hair and attempted to force her mouth open with the object of making her drink whiskey. He poured the whiskey up her nose and into her eyes and when she screamed he poured it into her mouth.

On 16th September, 1938, the petitioner felt tired and went to her bedroom to rest. The respondent wished her to accompany him to a motor cycle race, and when she refused he attempted to force her to do so by pulling her hair and twisting her nose and lips.

On 27th September, 1938, the respondent twisted and bruised the petitioner's arm severely; he also kicked her and knocked her down and when she was

lying on the floor, kicked her twice in the abdomen, then caught her by the hair and dragged her upstairs. On the following day the respondent apologised for his conduct, and the petitioner forgave him; after this the parties lived together for a time on somewhat better terms.

On 19th October, 1938, the respondent insisted on having sexual intercourse with the petitioner against her wish when she was ill.

A daughter was born to the parties on 27th April, 1939. The petition for divorce on the ground of cruelty was presented on 23rd January, 1940.

Andrews, L.C.J., held that the respondent had treated the petitioner with cruelty, but not being satisfied that the case was one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, he refused to grant a divorce.

Lowry, K.C., *Fox, K.C.* and *Hanna* for the petitioner and appellant:—

The present facts disclose a case both of exceptional hardship suffered by the petitioner and of exceptional depravity on the part of the respondent. The petitioner has suffered exceptional hardship in that she is now at the age of twenty-four left with a child. If judgment be against her the matter will be *res judicata* and she will be condemned for life to a state neither married nor single. If the pregnancy of the petitioner was the source of the discord then the Court has not the right to expect a reconciliation between the parties in view of the probability of another pregnancy occurring. Exceptional depravity on the part of the respondent is also demonstrated by the fact that the marriage was wrecked after so short a time. The profession and social position of the respondent render his acts doubly vicious. The test to be applied in determining whether the facts of the case establish exceptional depravity is whether the ordinary right-minded man would so stigmatise it. The conduct of the respondent, particularly on 27th

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September, was such that no woman of good character ought to be required to live with him.

Warnock, K.C., Chambers, K.C. and *Patton* for the respondent :—

The intention of the legislature, implicit in the imposition by the proviso of a stay of three years before the pronouncement of a decree in such cases, is that the parties should have every opportunity of becoming reconciled. In this connection it is important that all the acts complained of occurred within a period of three and a half months after the date of the marriage, at a time when the spouses were still temperamentally unaccommodated.

Of the acts of cruelty proved, only one is serious. This incident was the result of a violent quarrel and was the culmination of a series of disagreements. There is nothing which would justify the Court in excluding the possibility of reconciliation. There is nothing exceptional in this case. Whether exceptional cruelty amounts to exceptional hardship or demonstrates exceptional depravity is a pure question of fact. Depravity involves something far deeper and worse than an act of cruelty committed in a temper. Cruelty does not in itself connote depravity which implies some sexual perversion. The form of the order made by Andrews, L.C.J., is correct. There is no question of *res judicata.*

Cur. adv. vult.

BABINGTON, L.J.

BABINGTON, L.J. : The parties to this case were married on 7th July, 1938, and on 23rd January, 1940, the wife presented a petition for a divorce, charging her husband with cruelty. The petition came before the Lord Chief Justice who delivered judgment on 28th June, 1940, finding that cruelty was established but refusing to pronounce a decree of divorce as three years had not expired from the date of the marriage, and he was not satisfied that the case was one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent,

within the meaning of the final proviso to section 5 of the Matrimonial Causes Act (Northern Ireland), 1939. From this order the petitioner has appealed. The Lord Chief Justice accepted the evidence of the petitioner and her mother in all material respects, and his finding on the issue of cruelty was not challenged before us, so that we have not to consider how far such findings of fact are binding on the respondent in this Court. The petitioner has, therefore, proved her case and is entitled to have a decree of divorce pronounced, unless she is deprived of this right by the proviso to section 5.

In this Court counsel for the petitioner argued that the evidence discloses a case of exceptional depravity on the part of the respondent, and this was their main contention. They also argued that it discloses a case of exceptional hardship suffered by the petitioner; but although they maintained this throughout, the argument was not pressed with the same confidence as that based on the depravity of the respondent. They abstained from making any close analysis of the proviso, but, taking it so to speak at its face value, contended that the petitioner suffered exceptional hardship from the effects of the respondent's cruelty, and that these acts of cruelty show him to be a man of exceptional depravity.

Before considering these arguments the statute must be scrutinised with some care to ascertain its meaning and scope so far as this is possible. The Lord Chief Justice has dealt with the legislative origin of this proviso to section 5 and says that it was not part of the original bill, and was obviously an attempt to introduce in an abbreviated form, in the case of cruelty petitions only, the principle of section 1 of the (English) Matrimonial Causes Act, 1937, which placed a restriction on the presentation of all petitions for divorce for a period of three years from the date of the marriage. He goes on to compare the Northern Ireland and English Acts, but he does not deal with the sub-section beyond saying that the proviso has no application, except in the more extreme cases.

It has long been a settled principle of construction

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that what happens when a bill is on its way to the statute book is an irrelevant topic when the bill becomes an Act, and has to be interpreted ; and even if this Court were entitled to examine the reports in Hansard, it is notorious that many of the considerations that move the legislature do not appear during the debates, and are consequently not reported. There is the Act. We cannot look behind it or ask how it came to be there, but must ascertain its meaning without reference to what was said or done in Parliament.

The comparison of a statute of Northern Ireland with an English statute dealing with the same subject matter stands on a different footing. If the subject matter and the wording of both statutes are the same, any decision of an English Court would have to be carefully considered ; and if it were a decision of a court of co-ordinate jurisdiction, this Court would follow it, unless some very strong considerations were advanced for refusing to do so, bearing in mind that the ultimate appeal in both cases is to the House of Lords. But if the wording of the English Act differs from the wording of the Northern Ireland Act, the latter must be construed independently of the former. It may be that the Northern Ireland Act is one passed to keep our law in line with that of England, and that the two Acts are, therefore, substantially similar, but that does not relieve this Court of the responsibility of interpreting the Northern Ireland Act where it differs from the English one as a substantive Act to be construed according to its terms with such help as may be found in its provisions, its subject matter and legislative antecedents. In the course of the arguments counsel for the petitioner asked us to construe this proviso from the point of view of that mythical person the average right-minded man, and reading it for the first time, as I assume the average man does, without reflection, I was inclined to think that the language of the proviso stultifies whatever object it is intended to achieve, because if a petitioner can establish such a case of cruelty or other matrimonial offence as would compel the Court to dissolve the

marriage, such petitioner must have suffered exceptional hardship in the popular sense. To construe the proviso in this loose fashion would make it inoperative, and as this intention cannot be imputed to the legislature we are bound to find some more restricted meaning for the word exceptional and one which will make the proviso intelligible and workable.

The word hardship in the proviso may be something connected with the offence charged arising, for instance, as is alleged here, from the cruelty which has been proved, or it may, I think, arise from other circumstances in the relationship of the spouses ; but there cannot be any standard of hardship which can be said to be ordinary with which the Court can contrast the hardship in question to see whether or not the latter is exceptional.

The Lord Chief Justice says exceptional " hardship or depravity must be something which is uncommon or rare—something of unquestionably higher degree than one is accustomed to find in ordinary cases which come before the Court." He does not attempt to measure the hardship " one is accustomed to find in ordinary cases," and until this can be done, the words " exceptional hardship " are incapable of application and are left as it were in the air for want of something to contrast them with. I need not elaborate the impossibility of fixing a standard of hardship which may be expected in ordinary cases. The evidence itself varies in every case and the incidence of cruelty or hardship again varies in its severity with the infinitely varying social standards, mentality and physique of the persons involved. And if there is no such standard, this measure of what is exceptional cannot be the true one and we must examine the statute again to see whether it suggests any standard which is reasonably capable of application.

I think the clue is to be found in the proviso itself. It provides that where the petitioner claims a divorce on the ground of cruelty within three years from the date of the marriage the Court shall not pronounce a decree unless it is satisfied that the case is one of exceptional hardship suffered by the petitioner or of

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exceptional depravity on the part of the respondent. This merely provides for a suspensory period during which the decree is to be held up. I ask, why ? and can think of no answer but that the legislature thought that if such a stay were placed on the decree it might never have to be pronounced, or, in other words, the delay is designed to give the parties a chance of being reconciled. In my opinion this was the intention of Parliament and the exceptions to this suspensory period must, therefore, be those cases in which the Court can say that having regard to the facts proved it is either wrong or inequitable to refuse to make a decree in the hope of a future possible reconciliation. The terms exceptional hardship or exceptional depravity thus acquire a meaning, namely, such hardship or depravity as the Court thinks would or should destroy all possibility of reconciliation, or make it inequitable that the petitioner should be asked to consider such possibility. Approaching the proviso in this way, I have no difficulty in dealing with the petitioner's claim in this case, and in holding that on the evidence such a case of hardship or depravity as would compel a court to say that reconciliation is either impossible, or something which she should not be asked to contemplate, has not been established.

The main and indeed the only serious acts of cruelty proved were the incidents of 27th September when the petitioner was kicked in the abdomen by the respondent, and as the petitioner herself forgave him after he had apologised and continued to live with him, I am satisfied that the violence used on this occasion was not of such a nature as to negative the possibility of a reconciliation, or to compel the Court to say that she is entitled to her decree without further delay.

I reject the plea that what happened on this occasion establishes exceptional depravity on the part of the respondent. I think the word depravity is used in this proviso as meaning "perversion," and there is nothing to suggest that this respondent was in any way abnormal. Such a condition could no doubt be established by continued and deliberate acts of cruelty, and while I do not disagree with the inferences the

Lord Chief Justice has drawn from the evidence, I think the petitioner's story, which he has accepted, contains a certain amount of what may be described as padding and falls far short of proving depravity in her husband, or that she herself suffered any such exceptional hardship as would make reconciliation impossible. The decree in this case must be held up until the three years have elapsed from the date of the marriage.

Counsel for the respondent admitted that they could not press to have the petition dismissed and the section merely says that the Court shall not pronounce the decree even though the cruelty charged be established. The suit was therefore properly instituted and cannot be dismissed.

The order of the Lord Chief Justice is, I think, the proper order, though he might have added a right to the parties to apply, especially as I can conceive cases in which the situation may change in the interval between the hearing and the expiration of the three years from the date of the marriage, so as to make it right and even imperative that the original refusal to pronounce a decree should be reversed, and at the end of the period of three years from the date of the marriage the petitioner will be entitled to apply to have the decree pronounced if she so desires.

There is one other matter which arose during the hearing which should be dealt with, as it has to do with the procedure in these cases. The Lord Chief Justice says in his judgment : " I now pass on to a consideration of the proviso to section 5 of the Act of 1939, the part of the case which has caused me most trouble and upon which I received little assistance in legal argument. Indeed, Mr. Warnock who appeared for the respondent declined, though invited by me to do so, to address any argument to me on the matter (i.e., the proviso) at all, considering that to do so would in some way prejudice his client's position. It seemed to me then, as it does still, that instead of causing prejudice it simply provides his client with a second and necessary line of defence." On the hearing in this Court Mr. Warnock explained that

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having regard to the proviso he had declined to argue whether the decree could be pronounced before the main question was decided, as until then he could not know whether cruelty was found against his client or not, and, if found, in respect of what alleged acts. I think Mr. Warnock was right in this contention and that the argument upon the proviso was premature until the issues as to cruelty were disposed of, as it was impossible to say what hardship or depravity might or might not be exceptional until the facts were found, and to attempt to do so could only lead to confusion in the argument.

The result is that the appeal must be dismissed, but as this is a matrimonial suit and the construction of this proviso arises in this case for the first time, we will not condemn the wife in costs notwithstanding the fact that she has made charges against her husband which we do not think are fully warranted by the evidence.

MURPHY, L.J.

MURPHY, L.J. : In this case the petitioner appealed against that portion of the order dated 28th June, 1940, and made by the Lord Chief Justice on the hearing of the petition, whereby it was declared that the case was not one of exceptional hardship suffered by the petitioner, or of exceptional depravity on the part of the respondent within the meaning of section 5 of the Matrimonial Causes Act (Northern Ireland), 1939. The petitioner, a secondary school teacher then twenty-two years of age, was married to the respondent, a medical doctor, then thirty-one years of age, on 7th July, 1938. They lived together until 20th October, 1938, when the petitioner left the respondent, and has not since that date returned to him. The petitioner gave birth to a girl on 27th April, 1939, and this child is the only issue of the marriage.

The petition was based on cruelty and was filed on 23rd January, 1940. Having regard to the dates and the proviso to section 5 above mentioned, it was averred in paragraph 6 of the petition. " That since her marriage your petitioner has suffered exceptional

hardship because of the great cruelty and exceptional depravity of her said husband."

At the trial there was an acute conflict of evidence, but the learned Lord Chief Justice says, " Having seen and heard the witnesses giving their evidence and having carefully observed their demeanour, both in and out of the witness box, I have not the slightest hesitation in saying that the evidence of the petitioner and her mother is much to be preferred, and in all material respects their evidence has been accepted by me. This observation applies not merely to the evidence relating to the acts of cruelty complained of and the injuries to the petitioner occasioned thereby, but to other matters which gave rise to highly controversial issues."

We were not asked to review the learned Judge's findings of fact—for Mr. Warnock argued the case on behalf of the respondent rightly, in my opinion, on these findings. As stated by Lord Halsbury, L.C., in *Montgomerie & Co. Ltd. v. Wallace-James* (1): " Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court." In this connection I would also refer to the judgment of Lindley, M.R., in *Coghlan v. Cumberland* (2), and to that of Andrews, L.J. (as he then was) in *Cooper v. General Accident Co.* (3).

By his " speaking order " the learned Lord Chief Justice held that the petitioner had proved that since the marriage the respondent had treated the petitioner with cruelty within the meaning of section 2 (*c*) of the Matrimonial Causes Act (Northern Ireland), 1939,

(1) [1904] A.C. 73, 75.
(2) [1898] 1 Ch. 704, 705.
(3) [1922] 2 I.R. 38, 56.

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but the Judge "did not pronounce a decree of divorce, as three years had not expired from the date of the said marriage, and as the Judge was not satisfied that the case was one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent within the meaning of section 5" of that Act.

We have been referred to and have considered the evidence of the respondent and his witnesses, but having regard to the findings of fact of the learned Lord Chief Justice, which I unhesitatingly accept, I am of opinion that this appeal must be decided on the account of the respondent's conduct given by the petitioner and her mother. In the petition, while the use of filthy and threatening language by the respondent is averred, the charge of cruelty is based on four incidents: the first incident occurred "about the second week of September," the second on 16th September, the third on 27th September, and the fourth on 19th October.

These incidents were described in detail by the petitioner, and I need not repeat her evidence, which was corroborated, as to the injuries suffered, by her mother and by Dr. Dickey.

I agree with the Lord Chief Justice that if the incidents of the second week in September, when the respondent forcibly poured whiskey into the petitioner's mouth, having put it into her nose and eyes as she struggled and screamed, and that of 16th September, when the respondent attempted to compel the petitioner to accompany him to the Carrowdore Race by catching her nose and lips with one hand and her jaw with the other and twisting her face violently, had stood alone, the conduct of the respondent, however reprehensible, would not have warranted a decree of divorce, but the serious incident on 27th September coupled with these two former incidents and the language used by and the conduct of the respondent on other occasions, clearly amounted to legal cruelty entitling the petitioner to a decree of divorce. Nothing could excuse the conduct of the respondent, and in his clear and able argument Mr. Warnock did not suggest that it could be excused.

We have now to consider if, on the facts proved, the Lord Chief Justice should have been "satisfied that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent."

These words "exceptional hardship" and "exceptional depravity" appear in the proviso to section 1 (1) of the Matrimonial Causes Act, 1937. The English section, it will be noticed, prohibits the *presentation* of *any* petition for a divorce during the first three years after marriage, unless a Judge of the High Court on an application made to him allows a petition to be presented "on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent." Such an application is made (under Rule 2 (1) of the English Rules) by originating summons with evidence on affidavit, and it is, therefore, not surprising that provision is made in the latter part of section 1 (1) for cases where leave to present the petition has been obtained "by any misrepresentation or concealment of the nature of the case." The English statute also provides (section 1 (2)), that in determining such applications the Judge "shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years." The proviso in section 5 of the Matrimonial Causes Act (Northern Ireland), 1939, does not prohibit the presentation of a petition, but provides that the Court shall not pronounce a decree of divorce on the *ground of cruelty alone*, until the expiration of three years from the date of the marriage "unless the *Court is satisfied* that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent." It will be noticed that in the Northern Ireland statute there is no reference to the interests of the children of the marriage or to the probability of a reconciliation. I am of opinion, however, that in considering the question of "exceptional hardship" under the Northern Ireland

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statute the Judge (who would have come to the conclusion that, on the evidence of cruelty, a petitioner had established her (or his) case, and would be considering whether or not he should " pronounce a decree of divorce "), would treat the interests of the children and the probability of a reconciliation as elements necessarily affecting the determination of this question, while it appears to me that all such matters can be determined more appropriately when the Judge has heard the oral evidence given on the trial of the petition.

We have been informed that there has been as yet no reported decision on the meaning of the phrases " exceptional hardship " or " exceptional depravity." An exhaustive definition of either phrase could not be attempted, but I entirely agree with the Lord Chief Justice that on the facts of this case the petitioner has failed to establish that it is a case of exceptional hardship suffered by her or of exceptional depravity on the part of the respondent. In every case in which a petitioner proves that she or he has been subjected to such cruelty as would entitle a Judge to pronounce a decree of divorce, the petitioner must have experienced " hardship " to some extent. The use of the word " exceptional " in section 5 indicates hardship " out of the ordinary course." It is impossible to define the *quantum* of hardship which would constitute " exceptional hardship," but it can be said that the adjective indicates that the Judge must be satisfied that the petitioner has suffered hardship greater than that ordinarily associated with those cases in which petitioners successfully establish their claims for divorces on the ground of cruelty. If, having left the respondent owing to his cruelty, the petitioner had proved that she was in a penniless and friendless state, it might well be that such facts would have satisfied the Court that she had suffered exceptional hardship ; but the phrase is not " exceptional cruelty," and if the incident of 27th September amounted to " exceptional cruelty " the petitioner fortunately did not sustain any serious injuries as a result of the violence of the respondent ; while it was not suggested by the petition

or in evidence, that by leaving the respondent's house the petitioner was reduced to financial straits or that the nervousness and depression which she not unnaturally manifested in November and December continued for any lengthy period. Unless it were to be held that in every case where a woman establishes that her husband has been guilty of legal cruelty towards her, and that she has in consequence left the matrimonial home, the Judge who hears her petition should be satisfied that she has suffered "exceptional hardship," I cannot see how we should be justified in differing from the conclusion at which the Lord Chief Justice arrived.

Had I been of opinion that the lamentable violence of the respondent on 27th September—particularly when he kicked the petitioner twice on the left side of her abdomen—had been the act of a man who consciously intended to inflict serious injuries on his pregnant wife or to cause a miscarriage, and if as a result of such an attack the petitioner had fled from the house, a case of exceptional hardship *might* have been made out. But the petitioner clearly suggested that on this occasion her husband was drunk (see, in her direct evidence, "They sat and drank whiskey, hot water and sugar. . ." "He was very sick; I feared he would lie down and get pneumonia, so I got him back to the house"; and, in cross-examination, "He was very ill and was swaying where he stood. He said he would sleep on the floor"); and she said that "Day after he apologised and I said that I would give him another chance." The respondent's conduct was cruel and inexcusable but I cannot regard this assault of his wife as the murderous attack which Mr. Lowry described in such lurid language.

The words "exceptional depravity," I think, point to some extreme sexual aberrations or perverted instincts. There is no suggestion of sexual misconduct on the part of the respondent. He has been found guilty of cruelty which, apart from the proviso to section 5, would entitle the petitioner to a decree for divorce, but there is no suggestion that his cruelty was of a sadistic character. Mr. Fox invited us to

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say that the average right-minded man who heard the evidence would say that the respondent was a very depraved person. I can only say that, having read the evidence, I should not have thought of using the phrase "a depraved person" with reference to the respondent, although I agree that his conduct towards his young wife is deserving of a large selection of vituperative epithets. Mr. Lowry referred to the passage in *Latey on Divorce* (12th Edition, pages 64 and 65), in which the learned editor quotes from speeches in the House of Lords on the second reading debate on Mr. Herbert's Bill, which is now the Matrimonial Causes Act, 1937. As instances of what might constitute "hardship" these extracts are instructive, and the instance given by Lord Reading would seem admirably to illustrate a state of facts which, in my opinion, would constitute "exceptional depravity." I do not wish to limit the meaning of these phrases "exceptional hardship" or "exceptional depravity" by attempted definition or illustration; it is sufficient for me to say that I agree with the Lord Chief Justice, and the petitioner has failed to satisfy me that this case can be brought within either exception to the proviso.

Mr. Warnock argued with great force that all the instances of cruelty complained of occurred within a very short period, the last being a little more than three months after the marriage, and that when the petitioner, in cross-examination, said "Husband made several attempts at reconciliation. I made up mind knot must be cut," she had made up her mind to do what the legislature had prohibited, unless under extreme circumstances, for a period of three years after the marriage. On a future occasion it may be necessary to consider whether or not the determination of these questions arising on this proviso to section 5 is left to the discretion of the trial judge.

Accordingly, in my opinion, the appeal fails and should be dismissed, but having regard to the discussion which took place as to the legal position of the parties under the order of the Lord Chief Justice, I think it right to state shortly my present opinion on

this subject, although it does not come before us for decision. Under the order of the Lord Chief Justice the petition has not been dismissed, and, as at present advised, it appears to me that on the expiration of three years from the date of the marriage the petition could be re-listed ; the petitioner has proved that the respondent has been guilty of cruelty within the meaning of section 2 (*c*) of the Act of 1939, and this is, in my opinion, *res judicata* between the parties, so that, if nothing had arisen in the interval which would be a bar to the granting of such relief, it appears to me that the petitioner would then be entitled to a decree of divorce. It also appears to me that the alimony fixed by order of the Registrar in this case, dated 21st March, 1940, would continue payable until such a decree was pronounced, unless in the interval such alimony was varied or terminated for some special reason by order. Mr. Warnock and Mr. Chambers agreed that the petition could be re-listed and that the petitioner would then be entitled to a decree of divorce, but I do not think that this should be treated as an admission binding the respondent if he desired subsequently to challenge this view of the law.

MEGAW, J. : I agree, and will state as briefly as possible my reasons for thinking that this appeal is unsustainable. As I have formed the opinion that when the law is properly applied in such circumstances as the present, the consideration of the relevant facts of the case can be of little service in determining another case, I do not propose to rehearse the miserable history of the matrimonial relations found in the case before us. Happily it is not necessary to give a standard of cruelty, or rather the standard of hardship or depravity, which might be considered ordinary so as to distinguish with legal accuracy what is "exceptional" in the meaning of the statute applicable.

The Matrimonial Causes Act (Northern Ireland), 1939, has largely extended the jurisdiction of our courts in matrimonial causes. By section 2 of that Act it is enacted that a petition praying for the

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dissolution of the marriage may be presented to the High Court either by a husband or wife on the ground, amongst others, that the respondent has since the celebration of the marriage treated the petitioner with cruelty. In this section there is no limitation of the time within which the petition may be presented.

Section 5 (2) enacts that if the court is satisfied on the evidence that the case for the petitioner has been proved, the court shall pronounce a decree of divorce, unless certain qualifications which do not affect this case are present. In the same section there are two provisos, the first of which is only of moment here by reason of the difference of its language from that of the second, which is all important in this case. The first proviso commences in these terms: "Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition" if it finds that the petitioner has been guilty of certain matters which do not arise in this case. The second proviso is the part of the statute with which the present proceedings are vitally concerned. It reads as follows: "Provided also that the court shall not pronounce a decree of divorce on the ground of cruelty alone until the expiration of three years from the date of the marriage unless the court is satisfied that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent." This differs from the earlier proviso in giving no express power to dismiss the petition.

In coming to a conclusion as to the operation of this proviso it certainly is of some importance to have regard to the policy of the statute, which, in my opinion, is to be gathered from the words of the statute itself, construing them as in the case of other documents in the light of the surrounding state of affairs and law in existence at the time of the enactment, though, in my opinion, it is well established that the court may not have regard to the discussions that have taken place in the legislature in the process of considering the bill—nor indeed may they consider the terms of the bill as introduced. *Herron v. Rathmines Improvement Commissioners* (1). As I take it,

(1) [1892] A.C. 498.

the period of three years, which though not operative in the same way as in the English statute, is in reality of the same effect and for the same purpose, namely, that a marriage shall not be dissolved without giving the parties a reasonable time for mutual forgiveness. The difference, of course, in England and Northern Ireland is that pointed out so clearly by the Lord Chief Justice, viz., that in England the three years limitation applies generally to all grounds for dissolution of marriage, and in Northern Ireland only to cases of cruelty. While the procedure in England does not permit a petition to be presented, based on any of the grounds mentioned in section 2, unless in the case of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent which in our Northern Irish legislature are enacted in the case of the ground of cruelty only ; in Northern Ireland there is no such ban in the presentation of the petition, but the ban is against the *pronouncement* of a decree unless the court is satisfied that one or other of the stated exceptional cases exist.

The petition before us has been presented on the ground of cruelty alone, and to this the proviso under consideration is applicable. In our court a decree of divorce cannot be pronounced on the petition until the expiration of three years from the date of the marriage, unless it is shown to the satisfaction of the court that the case is one of *exceptional* hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. The adjective "exceptional" used in the statute governs the words "hardship" and "depravity," and not "cruelty." It is, therefore, not the ground for divorce alone, but certain exceptional attendant circumstances that have to be established to the satisfaction of the Judge before the decree is pronounced within the three year period, and I should infer that the state of things reasonably to be anticipated from the date of the hearing until the expiration of the three years cannot be left out of consideration. "Hardship" has special reference to the petitioner and involves the conditions which affect the petitioner in the continuing marital

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relationship before a final decree can be pronounced. "Depravity," on the other hand, relates to the individuality of the respondent, and its existence would clearly be a factor in coming to a conclusion as to the quality of the "hardship" that would affect the petitioner, and might even be a determining factor as to whether the hardship was, or was not, "exceptional."

I should think that the word "depravity" in the statute connotes moral perversion, whether in sexual or other moralities, and when it is considered with the word "exceptional," it is reasonable to conclude that the use of the word envisages a case where the respondent is shown to be so lost to notions of decency, morality or conduct as to make the continuance of the marriage relationship repugnant at and from the time of the hearing to ordinary human sense.

As regards "exceptional" hardship, every case must be considered on its own merits, giving full attention to the position and circumstances of the petitioner and any particular injury that is reasonably to be expected from the delay in procuring the decree. The determination of "exceptional" is imposed by the statute on the court, and in my opinion the court to which the responsibility of deciding the petition is given must be satisfied before giving a decree within the three year period that there are such extraordinary circumstances existent in the case as make it right and proper in the interests of justice to infringe on the policy that is expressly set out in the statute. "Exceptional" is a word that could hardly be expressed more clearly by definition. As I have said, every case must depend on its own facts, and it would only lead to confusion to attempt to formulate any rule that would govern all cases. Each individual case must in some way differ from a mean standard, and I have little doubt that every party in a matrimonial suit would consider that a case which concerns himself is exceptional, but it is the court which must be satisfied that the case is exceptional involving something above the average of the particular quality which gives rise to the term. The difference from the ordinary case

is one not of kind but of degree, and its existence denotes something definitely outstanding. I fail to see how there could be a more satisfactory tribunal than is mentioned in the Act to determine as a fact whether any case is exceptional. The judge has had a special experience as to matters affecting life. He has heard the evidence in circumstances which have given him a much better opportunity of forming an opinion as to the state of affairs necessary for a true conclusion than would be given by a study of the record by a Court of Appeal. Above all, he has seen the parties in a way in which he can form an opinion as to their character and state of mind to each other. A court would be severely handicapped in coming to a decision in most cases, and, indeed, in the present case, without seeing the parties. It would be a very strong measure for a Court of Appeal to set aside such a decision as has been made in the present case and declare that there has been convincing proof given of exceptional hardship or depravity as made it obligatory on him to overrule the manifest policy of the law. There are no grounds for such a step. I regard the finding of the Lord Chief Justice rejecting the contention that there was either exceptional hardship or cruelty as a finding of fact.

Though I am of opinion that the finding of the Lord Chief Justice is a finding of fact, which cannot be impugned in a Court of Appeal, except in a case where it is clear that it is based on an erroneous view of law, I think it right to say that I respectfully agree with the very full and careful review of the matters that have been discussed by the Lord Chief Justice in his judgment. I think that the prospects of reconciliation should not be left out of account, though they are expressly referred to in the English Act. The three years interval must in my opinion have some suggestion of the possibility of the parties becoming reconciled. The Lord Chief Justice has clearly taken all relevant matters into consideration. Some criticism was made of his statement that "Had miscarriage or more prolonged ill-health resulted from the respondent's conduct, my conclusion might well have been different." So far as the question

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of a case of exceptional hardship is concerned, in my opinion this was a matter that was of very great relevance indeed.

The form of order is in my opinion correct. It was admitted by the petitioner that the question of cruelty in its ordinary sense was *res judicata*. The petition itself is still in being, and in my opinion on the true construction of the statute it remains open for the court to pronounce a decree on the expiration of three years from the date of the marriage.

The language of the earlier proviso, differing as it does from that of the proviso with which we have been dealing, makes it clear to my mind that the petition should not be dismissed and that the power to make the decree remains in the court, and this has been kept open by the form of the order made by the Lord Chief Justice.

Solicitor for the petitioner : *Leslie Morris.*
Solicitor for the respondent : *J. Morris McKee.*

M.W.G.

McLAUGHLIN v. ANTRIM ELECTRICITY SUPPLY COMPANY.

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Sept. 23. Oct. 31.

Negligence—Dangerous Structure—Injury to child—Liability of Owner—Trespasser or Licensee.

The plaintiff, a boy aged about 12 years, was injured as a result of climbing on a structure erected by the defendants to carry their electric cables, and catching a cable which was charged with electricity. The structure consisted of two upright poles with cross bars connecting them; one of the poles stood on a public laneway and the other on an adjoining field separated from the laneway by a broken fence through which it was easy to enter the field. Under statutory regulations it was the duty of the defendants to have on the structure a danger notice and to make adequate provision to prevent climbing; no sufficient danger notice was on the structure and no adequate provision was made to prevent climbing. The adjoining land was used by children as a playground, and children played on the structure, but not to the knowledge of the defendants. The plaintiff had no express permission to play on, or to climb, the structure.

In an action for damages for negligence.

Held, by the Court of Appeal (Andrews, L.C.J., and Murphy, L.J., Babington, L.J., dissenting), that the defendants were not liable because the plaintiff was a trespasser and climbed at his own risk, and also because he was guilty of contributory negligence.

Per Andrews, L.C.J.: The statement in the headnote to the Report of *Excelsior Wire Rope Company, Ltd. v. Callan* [1930] A.C. 404 that "The immediate danger being apparent, it was not material whether the children were or were not trespassers," is not supported by any of the speeches of the Law Lords, and is misleading.

APPEAL from a decision of Brown, J., who dismissed an action brought to recover damages for personal injuries to the plaintiff caused by the negligence of the defendants.

The facts appear in the judgments.

Stewart, for the plaintiff:—

The defendants were guilty of a breach of statutory duty under Regulation 19 of the General Regulations of the Ministry of Commerce under the Electricity (Supply) Act (Northern Ireland), 1931, which requires

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them to affix danger notices to the supports and to make adequate provision to prevent unauthorised climbing The fact that the plaintiff was able to climb to the top of the pylon shows conclusively that the provisions taken were not adequate to prevent unauthorised climbing. The statutory duty is absolute. The danger notice was inadequate. There was no precaution taken to prevent climbing on the cross bars or channel iron. The pylon was a dangerous erection and was an allurement. Its construction was such as to invite children to climb. It was erected in a field without adequate fencing from the public lane, near a school, and about 300 yards from the centre of the town of Maghera. The defendants were negligent, because in view of the monthly inspection of the pylon by the defendants, the trampled condition of the ground round the poles and the scrapes on the cross bars should have revealed the fact of trespass. The plaintiff was not guilty of contributory negligence, because he did not appreciate the nature of the danger, i.e., electrocution. *Halsbury's Laws of England*, 2nd edition, vol. 23, par. 972.

The plaintiff was a licensee, because the defendants knew or ought to have known of his presence on the land and on the poles. [He referred to *Latham v. R. Johnson & Nephew, Ltd.* (1), and *Donovan v. Union Cartage Company, Ltd.* (2).] The failure by the defendants to take any step to prevent children from playing on and around the poles amounted to tacit permission, so that they became licensees. *Robert Addie & Sons (Collieries) v. Dumbreck* (3).

It is immaterial whether the plaintiff was a trespasser or a licensee. See the headnote in *Excelsior Wire Rope Co., Ltd. v. Callan* (4). The decisions in the last two cases are irreconcilable. The later decision is to be preferred and must be taken as overruling the former in the event of conflict. [He referred to *Mourton v. Poulter* (5).]

(1) [1913] 1 K.B. 398.
(2) [1933] 2 K.B. 71.
(3) [1929] A.C. 358.
(4) [1930] A.C. 404.
(5) [1930] 2 K.B. 183.

Lowry, K.C., and *Sheil* (for *Nicholson*, serving with His Majesty's Forces), for the defendants :—

The plaintiff became a trespasser immediately he ceased to use the lane for the purpose of passage and started to climb the poles. *Harrison v. Duke of Rutland* (1). *Hickman v. Maisey* (2). If the plaintiff entered the field before climbing the poles he was a trespasser on both.

If there was any breach of statutory or other duty by the defendants, the plaintiff was guilty of contributory negligence, because to his knowledge he had no right to climb the poles. Contributory negligence is an answer to a claim on the ground of a breach of statutory duty. *Groves v. Wimborne* (3). *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (4).

There was no trap or allurement. The poles had been in the same position and condition for four years prior to the accident without occasioning injury, and during that time the defendants had received no notice either of danger or of the presence of unauthorised persons near the poles.

In every similar case in which the plaintiff has succeeded the defendants have had actual knowledge of the presence of the plaintiff on the land. [They referred to *Robert Addie & Sons (Collieries) v. Dumbreck* (5). *Excelsior Wire Rope Co., Ltd. v. Callan* (6). *Moulton v. Poulter* (7). *Hardy v. Central London Railway Co.* (8).]

Cur. adv. vult.

Andrews, L.C.J. : The plaintiff, a boy of twelve years of age, met with an accident on 23rd September, 1939, when climbing a structure which during the arguments has been called a pylon, erected and maintained by the defendants for the purpose of carrying overhead high tension cables. In this action he seeks damages, alleging negligence and breach of duty on the part of the defendants. Brown, J., before whom the

(1) [1893] 1 Q.B. 142.
(2) [1900] 1 Q.B. 752.
(3) [1898] 2 Q.B. 402.
(4) [1940] A.C. 152.
(5) [1929] A.C. 358.
(6) [1930] A.C. 404.
(7) [1930] 2 K.B. 183.
(8) [1920] 3 K.B. 459.

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action was tried without a jury, gave judgment for the defendants, but provisionally assessed damages for the plaintiff at the sum of £232 if it should be held that he was entitled to a verdict.

The pylon consists of two upright poles upon which is erected certain electrical equipment. One of these poles stands upon, but at the side of, a public laneway, whilst the other stands in the adjoining field which belongs to a Mr. McNicholl. The fence along the laneway is described as ragged, with a number of openings, and this description is fully borne out by the photographs put in evidence by the plaintiff at the trial. Between the poles were certain horizontal bars, the lowest of which was two feet, whilst others were approximately four feet, ten feet, and twelve feet from the ground. To certain of these bars was attached an upright channel bar or iron with sharp edges. A more uninviting object for climbing than this bar it would be difficult to imagine; yet it is obvious that part of the boy's climb must have been made upon it, as barbed wire twisted round each post of the pylon for almost three feet—from seven feet ten inches to ten feet six inches from the ground—made climbing upon them utterly impossible. Thus it was that this clever young acrobat ultimately reached the high tension cable seventeen feet six inches from the ground. He says that he caught the wire not knowing that it was dangerous as he did not see the warning notice attached to one of the poles about twelve feet from the ground. He admits that he saw the barbed wire on the two poles; but, after making the further admission that it was put up to keep people from going there, this boy, whom his mother described as "bright and very intelligent," added that he did not know it at that time. He says that he fell on a cross bar; and it was, indeed, little short of a miracle that the accident was not attended with fatal consequences. None of the plaintiff's schoolmates was called as a witness to narrate the precise movements of the boy which led up to the accident.

The findings both of fact and of law at which the learned Judge arrived appear from the report and

from the registrar's certificate. All these findings in so far as they are adverse to his client have been challenged by Mr. Stewart in the argument which he addressed to us on behalf of the plaintiff. They may be summarised as follows :—

(1) That the plaintiff was a trespasser ; that he was not on the premises by the leave or licence of the defendants ; and that there was no evidence that the defendants knew or ought to have known that children were playing on the poles, if they were doing so ;

(2) That the provisions to prevent unauthorised climbing on the pylon were not adequate. In particular, that the warning notice should have been more distinct, and that barbed wire should have been put on the cross bar ;

(3) That the plaintiff was guilty of contributory negligence ;

(4) That there was no breach of duty by the defendants to the plaintiff as he was a trespasser ; and

(5) That there was no evidence of allurement.

In the course of the arguments our attention was directed, as it has been on several previous occasions in this court, to the leading authorities on the duty owed towards different classes of persons using their premises. Such persons are usually designated trespassers, licensees or invitees. To these well recognised classes Viscount Dunedin, in his speech in *Excelsior Wire Rope Co., Ltd. v. Callan* (1), added yet another—"permittees." But, as I read the passage, this addition was not made with the intention of creating a new class with new rights ; he merely coined this word because he thought it more appropriate to the facts of that case than the word "licensees."

I am again quoting from Lord Dunedin—this time in his speech in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (2)—when I say that a mere citation of a string of authorities is inimical to clear decision. Accordingly, I refrain from making a detailed review of the innumerable reported cases from the decision

(1) [1930] A.C. 404 at p. 411. (2) [1929] A.C. 358 at p. 372.

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Indermaur v. Dames (1), to the present time. Having given them further careful consideration, I have no reason to withdraw or qualify anything in the summary of the principles derived from them which I enunciated in *Gilmour v. Belfast Harbour Commissioners* (2). I there stated that "to trespassers the owner is only under a duty not to injure them wilfully or to allure them with malicious intent to injure them. Subject to this they must take the lands as they find them, and they trespass at their own risk. Licensees have a right not to be exposed to concealed traps or sources of danger. Subject to this, they also must take the premises as they find them; and, where dangers are obvious, they run the risk of them. The general principle of law as to gifts applies. There must be something like fraud on the part of the giver before he can be made answerable. To invitees the law extends a greater measure of protection. The owners of property, whilst not under an obligation to keep their premises absolutely free from obstructions, or always to employ the best known modes of construction, must at least take all reasonable care that such premises can be used without danger, that is, that the premises shall be as little dangerous as they reasonably can be having regard to the contrivances necessarily used in carrying on the business. Thus the owner of premises will expose himself to liability towards an invitee by allowing a trap-door through which his visitor falls unnecessarily to remain open."

It must be apparent to anyone from this statement of the law that I wholly reject Mr. Stewart's submission that it is immaterial whether the plaintiff was a trespasser or not. In my opinion the duty owed by the defendants to the plaintiff is entirely dependent on the determination of the class into which the plaintiff properly falls. This issue of fact is fundamental to the ascertainment of legal rights. Indeed, the latter follow as of course from the former. Mr. Justice Brown has held, as I have stated, that the plaintiff was a trespasser. In my opinion this finding is not only supported by evidence, but it is the only finding which

(1) L.R. 1 C.P. 274. (2) [1933] N.I. 114 at p. 137.

would have been justified by the facts. Both in playing round this pylon and in climbing up the upright channel bar which was the defendants' private property placed, pursuant to wayleave rights, over McNicholl's private land, the plaintiff was a trespasser. Mr. Stewart doubtless felt the weight of these facts, and was accordingly unable to present the plaintiff as an invitee, conscious as he was that the element of common interest, which is essential to the establishment of such a relationship, was wholly absent. But he did contend that if the character in which the plaintiff came on to the lands or the pylon was material he must be held to have been a licensee of the character designated by Lord Dunedin as a permittee. In considering the soundness of this submission I naturally put to myself the definition of a licensee given by the same learned Lord in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (1), where he says :—" A licensee is a person whom the proprietor has not in any way invited—he has no interest in his being there—but, he has either expressly permitted him to use his lands, or, knowledge of his presence more or less habitual having been brought home to him, he has then either accorded permission or shown no practical anxiety to stop his further frequenting the lands." In the present case there is not only no evidence whatever of any express permission given by the defendants to the plaintiff to climb or otherwise play upon this pylon, but the defendants' managing engineer, whose evidence was accepted by the learned Judge, expressly denied any such knowledge on the part of the defendants. This is not surprising when one considers the number of poles erected and maintained by the defendants over a wide stretch of country. The presumption would have been quite different had this pylon been near one of their principal stations or head office. And it is worthy of notice that, although the caretaker of an adjacent hall and the principal of the boys' school at which the plaintiff was a pupil gave evidence as to boys in the school occasionally swinging and playing on the pylon, neither of them ever uttered

(1) [1929] A.C. 358 at p. 371.

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a word of censure or warning to the boys or informed the defendants of the practice. Furthermore, no one suggests that anyone ever saw boys climbing on the pylon to the height of seventeen feet six inches from the ground, where alone this particular danger lay. The plaintiff himself said in his direct examination that he never climbed the pylon before but was round it often. These were the facts upon which Mr. Justice Brown found himself unable to hold that the plaintiff was a licensee ; and in my opinion he was right.

In these circumstances the law as to allurement and traps, upon which so many cases were cited in argument, appears to me to be beside the point, for it could not be suggested that either allurement or trap was created wilfully or with malicious intent to injure. The plaintiff was a trespasser as was the plaintiff in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (1), and he must share the same fate. That was a much stronger case in favour of the plaintiff than is the present. The injured boy was much younger. The danger—a terminal wheel of a haulage system—was within reach of anyone walking on the ground without climbing. It was dangerous and attractive to children, and at the time of the accident it was insufficiently protected. The defendants knew that the field in which this haulage system operated was used as a playground by young children. The accident occurred owing to the wheel being set in motion by the defendants' servants without taking any precaution to avoid accident to persons frequenting the field. As against these facts it was established that the defendants' officials had at times warned children out of the field, but that their warnings were disregarded. Accordingly, the House of Lords unanimously held that the boy was a trespasser and went on to the colliery premises at his own risk, and that the company owed him no duty to protect him from injury.

It was suggested in argument that this case is inconsistent with and must be taken to have been overruled by the decision of the House of Lords a

(1) [1929] A.C. 358.

year later in *Excelsior Wire Rope Co., Ltd. v. Callan* (1). That is a somewhat startling proposition, especially as, though *Addie's* case (2) is referred to by both Viscount Dunedin and Lord Thankerton, its authority is not questioned. Rather do I prefer to call *Addie's* case (2), as Lord Thankerton did, the normal class of case, and to regard the *Excelsior* case (1) as more special in its facts, such special facts justifying the finding that the plaintiffs were licensees. Accordingly, the legal duty owed to them by the defendants was different from and higher than that owed to the plaintiff in *Addie's* case (2). Lord Buckmaster pointed out that it was well known to the appellants (defendants) that when the machine was going to start it was extremely likely that children would be there, and that with the wire in motion, they would be exposed to grave danger. Lord Atkin, if I may presume to say so, put the matter with characteristic brevity and clarity when he said: "There was a swarm of children frequenting the spot where this machine was used, and frequenting it to the knowledge of the owners of the machine, and it appears to me that they owed a duty to these children to take reasonable precautions to see that the children were not injured by the occasional use to which the owners put that dangerous machine." Thus, it was the different facts, not any difference in the statement of the law, which warranted a different decision from that given in *Addie's* case (3); but such facts are so completely at variance with the facts of the present case that the former cannot be regarded as in any sense an authority to govern the latter. I pass from the case by merely saying that the concluding words of the headnote—"that the immediate danger being apparent it was not material whether the children were or were not trespassers"—is not, as far as I can see, supported as a general proposition by any of the speeches of the learned Law Lords, and it is in my opinion definitely misleading.

What I have said is, I consider, sufficient to determine the case; but there is at least one other ground upon

(1) [1930] A.C. 404.
(2) [1929] A.C. 358.
(3) [1929] A.C. 358.

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which the decision of the learned Judge can and, in my opinion, ought to be supported. He has found that the plaintiff was guilty of contributory negligence, i.e., of negligence which either caused or directly and materially contributed to the accident. I am entirely in agreement with this finding of the learned Judge, which introduces an element into consideration in this case which did not arise in any of the cases cited. Here we have an intelligent boy performing a climbing feat which, apart altogether from the presence of the high tension cable, was one of both difficulty and danger. Even if one accepts what he says when he stated in evidence that he did not see the warning notice, he must have known from the presence of the barbed wire on the poles which he did see that he was doing something that was wrong and forbidden—something that he certainly was not invited to do. If he had not committed this unlawful and negligent act he would never have come into contact with this hidden danger of the high tension current ; and, as this act continued right up to the moment of the accident, it was in my opinion not only a *causa sine qua non* but also a *causa causans* of the accident. As Mr. Sheil put it in his most helpful argument, it was only this act of contributory negligence on the part of the plaintiff which made this wire dangerous to him. In such circumstances a plaintiff can have no redress for he is the author of his own wrong.

It is suggested, however, in this connection that the position of a child is different from that of an adult. To a limited extent this is undoubtedly so. A different inference may be drawn from facts in the two cases. Thus, what may be an effective warning to an adult may be no warning to an infant ; or what may amount to an invitation or a licence to a child may be neither the one nor the other to an adult (Per Bankes, L.J., in *Hardy v. Central London Railway Co.* (1)). But Viscount Dunedin's speech in *Addie's* case (2), and Greer, L.J.'s judgment in *Liddle v. Yorkshire* (*North Riding*) *County Council* (3), make it very clear that children are not

(1) [1920] 3 K.B. 459 at p. 465.
(2) [1929] A.C. 358 at p. 376.
(3) [1934] 2 K.B. 101 at p 119.

by law placed in a different category, and that once a person has been held to be a trespasser there can be no difference whether he be a child or an adult, " for if there is no duty to take care that cannot vary according to who is the trespasser."

The finding of contributory negligence has an important bearing also on the only other issue which remains for consideration. As I have already mentioned, amongst the findings of the learned Judge was one that in the circumstances the provisions to prevent unauthorised climbing on the pylon were not adequate. This was in fact a finding of non-compliance with the requirements of No. 19 of the Regulations made in 1932 by the Ministry of Commerce for Northern Ireland. The breach of this regulation is not pleaded as a separate cause of action, that is, as a breach of statutory duty ; and, accordingly, I regard it on the existing record as important only in so far as failure to comply with its provisions amounts to at least *prima facie* evidence of the defendants' negligence. No application to amend the statement of claim was made to Brown, J., or to this Court ; and this was probably due to an appreciation of the fact that contributory negligence constitutes a defence to a cause of action for breach of statutory duty just as it affords an answer to an ordinary action for negligence. *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1). It is incumbent on a plaintiff to show not merely a breach of duty, but that his hurt was due to the breach. Proof of the breach alone will not suffice ; for, to borrow Lord Ellenborough's oft-quoted phrase : " One person being in fault will not dispense with another's using ordinary care for himself."

For these reasons I am of opinion that the plaintiff's motion fails and must be refused with costs.

Babington, L.J. : This case raises questions of general application and of some novelty and importance, and as the principles involved have been extensively debated in former cases, through which it is not always easy to find one's way, I will state my con-

(1) [1940] A.C. 152.

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clusions briefly at the outset in an attempt to make myself intelligible.

It is my opinion that the defendant company, having acquired statutory powers to erect their line subject to regulations for securing the safety of the public, and having failed to comply therewith, were guilty of negligence: that the poles on which the infant plaintiff was injured were to him an allurement and a trap; and that on the facts he was not a trespasser nor guilty of contributory negligence, and is therefore entitled to succeed, the real and only cause of his injuries being the negligence of the defendants as in *Lynch v. Nurdin* (1).

The minor plaintiff is a boy aged eleven years and eleven months. The defendants are an electricity supply company incorporated by the Antrim Electricity Supply Act (Northern Ireland), 1928, a special Act within the meaning of the Electricity Supply Acts, 1882 to 1919.

The minor plaintiff sues by his father and next friend in respect of injuries which he sustained through taking hold of a naked wire heavily charged with electricity and carried on wooden and iron supports which the plaintiff was then climbing for amusement. This wire and its supports were the property of the defendants, erected by them under their statutory powers and in supposed conformity with regulations prescribed by the Ministry of Commerce under the Electricity Supply Acts.

The main facts as set out in the report of Brown, J., who tried the case without a jury, are very short. The defendants prior to this accident had erected an electrical support for their overhead transmission wire at a point about three hundred yards from the town of Maghera. This support consisted of two upright poles about four feet apart with several iron cross pieces and stays and a vertical stay carrying a lever attachment on the centre line. These stays ran from about two feet from the ground to twelve feet, the live wire being on the top of the poles seventeen feet six inches from the ground. The exact formation of this structure is

(1) 1 Q.B. 29.

unimportant save that in its unprotected state it presented the appearance of a ladder, which could be easily climbed by the average small boy. It had a heavy iron cross bar at a height of twelve feet from the ground and from this, or from an iron ring slightly above it, the live wire seventeen feet six inches above the ground could be reached. Between seven feet and ten feet six inches from the ground six laps of barbed wire were wound round each pole.

The defendants erected these poles under a wayleave granted to them by the owner of the lands, one pole being erected on a laneway and the other in a field adjoining this laneway which was a public laneway to which children were entitled to resort. Next Maghera it ends at an open space adjoining a main road and at the other side of this road are situated the Fair Hill schools at which the plaintiff was a pupil. The distance from the poles to the school was about seventy yards and all the space in between is open. The open ground opposite the school together with the open space at the other side of the main road was used by the children as a playground which brought the children to within a few yards of the poles. Boys often climbed upon the structure, and played on it; the ground round it was trodden, and one bar was scraped as if by people treading on it; there was nothing to prevent children climbing the poles; the master of the school never warned them not to do so and there is no evidence that anyone else did. The defendants, however, did not know of any trespass on the structure, and the climbing by children generally cannot affect their liability.

The only evidence as to how the plaintiff came by his injuries was that given by himself. He says that he and three other boys were "playing cowboys" round the poles, he climbed up between the poles, another boy following him, it was not hard to get up, he saw no notice and did not know it was dangerous, that he never climbed it before, and he saw three other boys climbing it that day.

On this evidence Brown, J., in dismissing the plaintiff's claim says: "I found as facts that plaintiff

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was a trespasser, that there was no leave or licence and no evidence that defendants knew or ought to have known that children were playing on the poles if they were doing so, that the provision to prevent an unauthorised climbing of the poles was not adequate. I was of opinion that the warning notice should have been more distinct, and that barbed wire should have been put on the cross bar. That the plaintiff was guilty of contributory negligence. I held that the plaintiff was a trespasser and as such was not entitled to succeed as there was no evidence of allurement. I gave judgment for the defendants with costs. By consent I assessed damages for the plaintiff in £232 if I should be wrong in my judgment."

The regulations for overhead lines and the agreement with the landowner for wayleave were proved, and the evidence they afford, together with the statute under which the defendants are incorporated, shows by what right and under what statutory liabilities they placed these poles on the laneway.

At the date of their incorporation there was in force a number of regulations for overhead lines prescribed by the Ministry of Commerce for Northern Ireland for "securing the safety of the public." These regulations were made under section 6 of the Electric Lighting Act, 1882, which provides that the Board of Trade may from time to time make regulations for securing the safety of the public from injury, and they are to have the same effect as if inserted in the special Act authorising the undertaking. By the Electricity (Supply) Act, 1919, the functions of the Board of Trade were transferred to Electricity Commissioners, and by the Electricity (Supply) Act (Northern Ireland), 1931, Fifth Schedule, Part II, paragraph 1, the functions of the Electricity Commissioners for Northern Ireland were transferred to the Ministry of Commerce. The Ministry of Commerce have made a number of General Regulations pursuant to their authority and the Regulations we are concerned with here were subsidiary to the General Regulations. They relate solely to overhead lines and have the same effect as if originally inserted in the

defendants' special Act, and some of them are of great importance as affecting liability in this case. They are as follows :—

Line Conductors to be inaccessible.

4. " Line conductors shall be rendered inaccessible to any person from any building or other place without the use of a ladder or other special appliance."

The expression " line conductor " is defined to mean " conductors used for transmitting a supply of electric energy including so much of any service line as may be under the control of the undertakers." It was a " line conductor " within this definition that the plaintiff caught hold of.

Danger Notices.

19. " Supports shall be numbered consecutively and each support shall have a danger notice of a permanent character securely fixed to it."

" Adequate provision shall also be made to prevent unauthorised climbing."

These Regulations are expressed to apply to any overhead lines erected by authorized undertakers. There are also a number of other Regulations designed to secure the safety of the public from injury arising out of these overhead lines, but they are not material as the safety of this line was not impugned at the trial on any ground save accessibility. The defendants are bound by these Regulations. They procured the special Act under which they erected and maintained their line, subject to the terms of these or of such further or other regulations as the Ministry of Commerce might think expedient, and these Regulations are the measure of their duty to the public.

On the evidence this line was not rendered inaccessible, though Brown, J., does not make any reference to this in his report ; but he finds that the provision to prevent unauthorised climbing was not adequate. I think, however, that the question of inaccessibility is involved in and negatived by this finding, for if unauthorised climbing had been adequately provided against so as to prevent it under Regulation 19, the line would have been inaccessible

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without the use of a ladder or other special appliance as required by Regulation No. 4. The evidence as to compliance or non-compliance with these Regulations is very meagre. The provision actually made by the defendants was a few rings of barbed wire wound round each pole beginning at seven feet and going up a further three feet six inches, which might possibly be a compliance with the Regulations in the case of a single pole but was quite inadequate as applied to this structure.

I agree with Brown, J., that this was not adequate provision against unauthorised climbing. The plaintiff's advisers apparently treated this as a case of *res ipsa loquitur* seeing that the minor plaintiff climbed the poles with ease, and by way of answer the defendants could only point to the barbed wire, which the facts of this case prove to have been little more than an evasion of the Regulations.

It is not the function of judge or jury to say what would be adequate provision against unauthorised climbing, or how line conductors are to be rendered inaccessible. This is a matter for the defendants and their advisers and the courts can only pronounce on the results of their efforts when challenged. Brown, J., says : " Barbed wire should have been put on the iron bars." Whether this would have been a compliance with the Regulations or not would depend on evidence but as the plaintiff was only concerned to show that the poles were not adequately protected at the time of the accident, while the defendants maintained that they were, the question does not arise.

It was suggested that a rigid interpretation of these Regulations would impose too onerous a liability on the defendants and that to render their whole line inaccessible would involve them in heavy expenditure ; but since the special Act gives them the right to invade private property everywhere, with a few minor exceptions, and erect this highly dangerous line across the countryside, I cannot say that I regard the Regulations made for the express purpose of securing the safety of the public as being unduly drastic. The defendants accordingly owed a duty to the public

to render their line inaccessible without the use of a ladder or other special appliance and to make adequate provision to prevent unauthorised climbing, and in failing to do so they were guilty of negligence.

In these circumstances the action is properly laid in negligence even though the facts also establish a breach of the Regulations or the creation of a nuisance. See *Harrold v. Watney* (1).

The learned Judge was also of the opinion that the warning notice should have been more distinct. Regulation 19 does not prescribe the size or shape of these notices. It says they are to be of a permanent character but as their purpose is to warn the public, including children and young persons, of the danger latent in the wire they must be reasonably adequate to do so. On the evidence Brown, J., has found that it was not sufficiently distinct, and the defendants were therefore negligent in this respect also, but though the inadequacy of the notice is an important factor in the case, it is of minor importance compared with the failure to prevent unauthorised climbing. The plaintiff has therefore established the duty owed by the defendants to the public generally, and in the words of Willes, J., in *Daniel v. Metropolitan Railway Co.* (2), has further shown " with reasonable certainty what particular precaution should have been taken " and that the defendants in breach of their duty omitted to take them.

I agree that the duty owed by the defendants cannot apply to the public in all circumstances, and that if the minor plaintiff was a trespasser on the lands where the poles were situated the defendants owed him no duty and he was rightly non-suited. Three separate and distinct acts of trespass were relied on by the defendants during the argument. The first was that the boy was a trespasser on the laneway where it was said he had no right to be, or, alternatively, no right to do more than pass and repass. The second was trespass on the lands of the owner of the soil on which the poles were erected ; and the third, trespass on the poles themselves. During the argument I

(1) [1898] 2 Q.B. 320. (2) L.R. 3 C.P. 216 at p. 222.

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inquired how the boy could be a trespasser in getting to these poles. He was on the highway until he reached them and was a member of the public to whom the highway is dedicated. He was therefore on the laneway as of right and Lord Atkinson says in *Cooke v. The Midland Great Western Railway Co. of Ireland* (1): "The right of the boy or child to be on the public street, as one of the public, is, no doubt, a larger right than that which would belong to him as a licensee." No satisfactory answer was given to this question except to say that on the evidence he went up between the poles and was therefore off the laneway and a trespasser on the adjoining lands, and that even if this be an erroneous view of the evidence, he was a trespasser when he stopped opposite the poles and began to play round them because he then ceased to use the laneway as a passenger and converted himself into a trespasser. As to the first of these answers, I think the proper inference is that the boy's approach to the poles was by the laneway. He did not say so in his evidence, but it must be presumed to be so, as it was his only lawful approach and no other route was suggested by anyone at the trial or in argument; and if, as I hold, he came to the "fascinating and fatal" object lawfully by the highway and if in the course of his game he was there allured by the poles, he climbed them under the influence of the fascination or allurement and was no more a trespasser than a man who falls into an unfenced excavation substantially adjoining the highway from which he may have stepped involuntarily and without negligence—see *Binks v. South Yorkshire Railway and River Dun Co.* (2), per Blackburn, J.—in which case it is immaterial to discuss whether he would have been a trespasser if he had stepped voluntarily into the excavation. But whether this boy is to be regarded as a trespasser on the poles or not, Lord Atkinson's summary of the law in *Cooke v. The Midland Great Western Railway of Ireland* (3), appears to me conclusive that trespass on the machine is immaterial in these cases. He says: "The authorities from *Lynch v. Nurdin* (4) downwards establish, it would

(1) [1909] A.C. 229 at p. 238.
(2) 3 B. & S. 244.
(3) [1909] A.C. 229 at p. 237.
(4) 1 Q.B. 29.

appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach ; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character ; and, thirdly, that if vehicles and machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, *or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred.*"

The principles stated by Lord Atkinson in this passage in so far as they apply to the present case, in which the offending object was on or adjoining the highway, have never been questioned. Line by line and word by word the passage covers the facts here and disposes of the argument that trespass on the poles at the time of the accident in any way affects the plaintiff's right to recover.

After the passage quoted above, Lord Atkinson says at p. 238 : " I omit the words ' public place or thoroughfare ' from the immediately preceding sentence, because I think the principle of these decisions applies to any place where boys or children have a legal right to go and may reasonably be expected to be not unlikely to frequent." If the words so omitted are read back into the passage and its application is limited to public places and thoroughfares, it ceases to have any application to children on private ground

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who may or may not be licensees or invitees. It is a compendious review of the authorities and I apprehend that so amended it escapes from all the criticisms that have been passed upon the actual decision in the case and can be applied without reservation.

Brown, J., says : " I found as facts that the plaintiff was a trespasser ; that there was no leave or licence ; and no evidence that defendants knew or ought to have known that children were playing on the poles if they were so." I have some difficulty in following this. I think the learned Judge must have had *Cooke v. Midland Great Western Railway of Ireland* (1) in mind, and was negativing not only leave and licence generally but such leave and licence as may apparently be presumed under certain circumstances from knowledge on the part of the defendants that children were in the habit of playing on their property, coupled with failure to take steps to prevent them. But that case does not apply here, because the poles were either on or substantially adjoining the highway, and the defendants were under express statutory liability to take due precautions for the safety of the public. It may well be that the defendants would have been liable in the absence of any regulations, but I express no opinion on this point, for the regulations are imperative and the defendants admit their duty and claim that they have performed it.

The next matter to be considered is whether these poles were an allurement and a trap. Brown, J., does not refer to traps in his report, but he says there was no evidence of allurement, and on this I am of the opinion that he misdirected himself. The evidence of the boy, which he accepted, seeing that he does not comment on it in any way, is conclusive to my mind. He was in company with other boys, armed with a toy revolver and playing a game of " cowboys." The poles presented a suitable venue for the game, as they clearly would have been had they not carried a live wire, and the proper inference to be drawn from the uncontradicted evidence is that they were in fact alluring and did allure or fascinate the minor plaintiff.

(1) [1909] A.C. 229.

In *Latham v. R. Johnson & Nephew, Ltd.* (1), Lord Sumner, then Hamilton, L.J., says: "Two other terms must be alluded to—a "trap" and "attraction" or "allurement." A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger; and at p. 416: "A child will be a trespasser still, if he goes on private ground without leave or right however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object"; and a few lines lower down: "It must be a matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal."

I hold that these poles, unprotected as they were, with a warning notice not sufficiently distinct and a live wire on top, accessible to any active youngster, were in law capable of being a trap for the minor plaintiff who did not know the wire was dangerous, and in this trap he was undoubtedly caught. Unless, therefore, the defendants can establish contributory negligence the plaintiff must succeed. Here again the learned trial Judge has in my opinion drawn the wrong inference from the facts. He finds that the plaintiff was guilty of contributory negligence but he does not say how he arrived at this conclusion nor what this negligence consisted of. The boy was one month and four days short of being twelve years of age. His mother says he was a bright boy, but no attention seems to have been paid to his mental powers at the trial for his schoolmaster was not cross-examined about them, and I cannot find that apart from his mother's statement they were referred to at all—and the Judge does not refer to

(1) [1913] 1 K.B. 398 at p. 415.

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them or deal with the boy's powers of observation or his knowledge in his report. I will, therefore, assume that he was an average boy of his years and deal with the question of contributory negligence on this basis and having regard to the nature of the defendants' negligence and the quality of the act or acts of negligence alleged against the boy. He said: "I caught the wire and I fell on a cross bar. Did not know it was dangerous." This evidence has not been challenged and as the Judge does not say he disbelieved it, it must be assumed to be true. Moreover I regard it as being highly probable that this boy did not know anything about the nature of a live wire, or if he did that he did not appreciate the danger. If he had known and appreciated the danger I do not think he would have caught hold of the wire, and the nature of his act and his evidence as to it go hand in hand and corroborate each other. I have assumed that the negligence found by the Judge is that of catching hold of the wire. He does not say so, and he may have thought that the boy was guilty of an act of negligence in climbing the poles. To the boy's eye these poles must have presented the appearance of a ladder easily climbed, inviting and perfectly safe for an active boy to climb. Apart from the presence of the live wire this was, no doubt, true, and I think he must have been capable of comprehending the obvious and apparent danger, namely, that he might fall off and hurt himself. Mr. Stewart admitted that if he had been injured in this way his negligence would have been an answer to a claim for damages; but as he did not fall from the poles he was not negligent in climbing them for though in one view the climbing may have been wrong, it was not in itself negligence, and if it had not been for the live wire he would no doubt have come down as safely as he went up. Was he then guilty of negligence in catching hold of the live wire? This must be ascertained having regard to his mental powers and his knowledge of the nature of the object with which he was meddling. In everyday affairs a child, even a young child, may be guilty of contributory negligence as when it runs in front of traffic on the high-

way ; and where the danger is obvious and apparent even to a child, this is an intelligible proposition. But the danger here was neither obvious nor apparent to a person not equipped with the knowledge necessary for its comprehension, and I do not consider that I should be justified in imputing to this boy knowledge of the danger inherent in the defendants' live wire which he says he did not possess. I believe that at the moment he put out his hand and caught the wire he was ignorant of its nature and that this might have been anticipated by the defendants who, apart altogether from general considerations, were peremptorily warned by the Regulations. Contributory negligence is a breach of duty to take care and to avoid risks, but a boy obviously cannot be expected to avoid risks of which he is unaware, and his act not being an act of negligence but one done in ignorance, and the defendants' breach of duty being clear their negligence and their negligence alone was the cause of the accident. This is put with great clearness by Lord Sumner in *Latham v. R. Johnson & Nephew, Ltd.* (1) : " Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief." *Crocker v. Banks* (2) is in some respects similar to the present case. In that case a girl of seventeen was filling bottles at a soda-water machine. A bottle burst while she was filling it and she was injured through not having put on a mask which was provided. The girl swore that she did not know the danger, or that she ought to have been wearing a mask when the accident happened. Contributory negligence was pleaded, but the Court of Appeal held

(1) [1913] 1 K.B. 398 at p. 413.

(2) 4 T.L.R. 324.

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that it was not negligence for a girl of her age to omit to put on the mask if she did not know she was bound to do so at that period of the operation.

The present case is a much stronger one for the plaintiff, for the boy's evidence as to his want of knowledge is more convincing than the statement of the girl in *Crocker v. Banks* (1), and he is very much younger. The importance of the case lies in the application of the principle that in the case of a minor plaintiff his or her knowledge of the danger is of paramount importance and in the fact that the Court of Appeal did not impute to the girl any greater knowledge than she said she possessed. The head note to *Latham v. R. Johnson & Nephew, Ltd.* (2), adopted by Lord Atkinson in *Glasgow Corporation v. Taylor* (3), shows that the plaintiff there was non-suited by the Court of Appeal, there being neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land. Here there is allurement, trap and dangerous object and as the minor plaintiff came to the dangerous object as of right, and it is therefore unnecessary to prove invitation, I hold that his right to recover has been established.

The cases referred to in the learned Judge's note do not help the defendants. In *Liddle v. Yorkshire (North Riding) County Council* (4), the defendants owed no duty to the public other than not to do the work in a negligent manner and Scrutton, L.J., at p. 113, says there was no evidence of this. There was no trap or hidden danger, the offending object being a heap of soil and a wall, and though the question of contributory negligence was not put to the jury I should have thought that the behaviour of the boy aged seven was clearly negligent in respect of a matter which he was capable of understanding, namely, that if he did not sit quietly on the top of the wall he was likely to fall off and be hurt. Scrutton, L.J., held that the boy was a trespasser on the wall on which he was sitting and on the heap of earth by which he climbed there, though I think this finding was unnecessary as the

(1) 4 T.L.R. 324.
(2) [1913] 1 K.B. 398.
(3) [1922] 1 A.C. 44 at p. 58.
(4) [1934] 2 K.B. 101.

danger was apparent and obvious and there was no trap or concealed danger. The case does not decide that if instead of the heap of earth and wall there be an object on the side of the highway which is an allurement and a trap, a child allured and injured by it would not be entitled to recover even though a trespasser.

In *Hardy v. Central London Railway Co.* (1), the child was a trespasser in the booking hall where the dangerous object was to be found. It was not suggested that when he placed his hand in the machinery of the moving band of the escalator he was trespassing on the dangerous machinery.

In *Donovan v. Union Cartage Co., Ltd.* (2), again there was no trap or concealed danger. The child while climbing on to an unhorsed van standing in the street fell off and injured himself. The decision is not based on trespass but on the absence of inherent danger.

The case of *Glasgow Corporation v. Taylor* (3) is more in point. There a boy of seven years of age while walking in a public park in Glasgow saw a shrub bearing poisonous berries and was tempted to eat them in ignorance of their nature. He died and his father brought an action for damages in respect of his death. No warning had been given by the defendants who knew that the berries were a deadly poison and it was admitted that the child had a right to be in the park. The House of Lords held, affirming the Second Division of the Court of Session in Scotland, that the averment disclosed a good cause of action. There the child was in the park as of right. He was allured by the berries which were dangerous to the knowledge of the defendants and trapped by his own ignorance of this fact. If the child had had to climb a tree to reach the berries I think the case would have been on all fours with this one. Lord Sumner says at p. 64: "The position, therefore, I take to be, that the child had a right to be in the part of the park where the defenders had a right to grow their bush, and the

(1) [1920] 3 K.B. 459.
(2) [1933] 2 K.B. 71.
(3) [1922] 1 A.C. 44.

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law has to place the exercise of each of these two rights in a just relation to that of the other. The child had no right to pluck the berries, but the corporation had no right to tempt the child to its death or to expose it to temptation regardless of consequences"; and at page 67 he says: "A measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations." That care was not rendered by the defendants to the minor plaintiff in this case and they cannot avoid liability on either of the grounds relied on by the learned Judge who tried the case. In my opinion judgment for the damages found should be entered for the plaintiff together with the costs of the action and of this appeal.

Murphy, L.J.

Murphy, L.J.: I agree with the Lord Chief Justice, and only desire to state my reasons, shortly, because we are, unfortunately, differing from Babington, L.J.

The learned trial Judge (Brown, J.) has found "as facts": (*a*) that the plaintiff was a trespasser, and (*b*) that the plaintiff was guilty of contributory negligence. It appears to me that, unless the plaintiff can succeed in setting aside *both* these findings, his application to have judgment entered for him, or, alternatively, for a new trial, must fail.

I shall first consider the evidence on which the first finding was based. I shall call the structure on which the plaintiff was climbing when the accident happened "the pylon," though, from one of the drawings referred to before us, it appears to be technically described as a "switching pole." This pylon was erected under a form of wayleave agreement between a man called McNicholl and the defendants. As erected it "straddled" a mound and wire fence by the side of a laneway and one "standard" of the pylon was on the laneway side of the wire fence. There was nothing to prevent any person who was passing along the laneway from approaching the pylon. Whether there was a public or a private right

of way along the laneway does not appear, but I shall assume in the plaintiff's favour that the plaintiff had the right of passing along the laneway. It is clear, however, that he had no right to use the laneway for playing round the poles or for climbing the pylon, and that when doing so he would be a trespasser. *Harrison v. Duke of Rutland* (1), and *Hickman v. Maisey* (2), are two well-known authorities illustrative of this principle as applied to the use of highways, and I am of opinion that when the plaintiff commenced to climb the pylon he was, *a fortiori*, a trespasser on the defendants' property. The duty of occupiers of premises towards trespassers as distinguished from licensees or invitees has been considered in many reported cases, the effect of which is clearly and succinctly stated in the judgment of Andrews, L.J. (as he then was) in *Gilmour v. Belfast Harbour Commissioners* (3), with which statement I respectfully agree. *Cooke v. Midland Great Western Railway of Ireland* (4) has been regarded almost as a "*triste bidental*" to be distinguished on the ground (*vide* Lord Hailsham in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (5)) that it "rested upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap." See also Lord Atkinson in *Glasgow Corporation v. Taylor* (6). In the present case Brown, J., has held (rightly in my opinion) that there was "no evidence that the defendants knew or ought to have known that children were playing on the poles, if they were doing so." There is, therefore, nothing on which a case of leave and licence can be found. The plaintiff, who was almost twelve years of age and is described by his mother as having been a "bright boy, very intelligent," saw the barbed wire on the two poles of the pylon and knew that "it is put up to keep people from going there." I have considered the evidence, the photographs produced, the map and the section

(1) [1893] 1 Q.B. 142.
(2) [1900] 1 Q.B. 752.
(3) [1933] N.I. 114 at p. 137.
(4) [1909] A.C. 229.
(5) [1929] A.C. 358.
(6) [1922] 1 A.C. 44 at p. 53.

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drawings, and I am not prepared to hold that this pylon was either an allurement or a trap. To so hold would be, in my opinion, to extend greatly the principle established by the numerous cases on this subject.

Mr. Stewart referred us to *Excelsior Wire Rope Co., Ltd. v. Callan* (1), and to the doubts expressed by Scrutton, L.J., in *Mourton v. Poulter* (2), as to the exact ground of distinction between that decision of the House of Lords and their earlier decision in *Addie's* case (3). I am glad that I am not called upon to attempt to resolve the difficulty which presented itself to that eminent Judge, for the *Excelsior Wire Rope Co.'s* case (1) and *Mourton v. Poulter* (2) are both instances of cases "in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near." (*vide* Scrutton, L.J., in *Mourton v. Poulter* (2) at page 191). In the present case nothing of this kind was done by the defendants, and, accordingly, I hold that the plaintiff as a trespasser was bound to take the pylon as it was, and that he trespassed at his own risk.

I am also of opinion that the finding of contributory negligence was warranted by the evidence. I have already adverted to the age and intelligence of the plaintiff, to his knowledge of the barbed wire on the poles of the pylon, and of the reason for the presence of this wire. The plaintiff did say that he "did not know it was dangerous, saw no notice." and the learned Judge has found that the warning notice should have been more distinct and that the provision to prevent an unauthorised climbing of the poles was not adequate, but the learned Judge who saw and heard the several witnesses was entitled to accept or reject any part of the evidence, and while the plaintiff may not have appreciated the danger associated with high tension cables, I think that there was ample evidence to justify a finding that the plaintiff was guilty of negligence which directly contributed to the accident, and in arriving at this finding I do not think that the learned

(1) [1930] A.C. 404.
(2) [1930] 2 K.B. 183 at p. 190.
(3) [1929] A.C. 358.

Judge had to be satisfied that the plaintiff appreciated *all* the risks involved when in the course of a game of "cowboy" he and other boys decided to climb the pylon.

It is well settled that contributory negligence is a defence to an action based on a breach of statutory duty. I find this principle recognised as far back as 1856 in *Caswell v. Worth* (1), while it has been fully discussed in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (2), by Lord Atkin, at pp. 164, 165, and by Lord Wright at pp. 178, 179, and applied in the present month by Tucker, J., in *Wood v. London County Council* (3).

I am, accordingly, of opinion that on either of these findings the plaintiff must fail; but I think it right to say, having regard to the arguments addressed to us, that, on the notes of the evidence, the map, drawing and photographs, I entirely agree with the learned Judge that "the warning notice should have been more distinct" and that "the provision to prevent an unauthorised climbing of the poles was not adequate." The attempt by counsel to explain the impossibility of putting barbed wire on the cross-bar entirely failed to carry conviction to my mind, while if the danger notice, skied up at a height of twelve feet with the writing inverted, is "standard," as stated by defendants' engineer, the sooner the standard is altered the better. At the same time it must have required considerable agility to climb the pylon as it was, although the plaintiff stated that it was "not hard to get up."

Solicitors for the plaintiff: *P. J. Agnew & Sons.*
Solicitors for the defendants: *C. & H. Jefferson.*

M.W.G.

(1) 5 E. & B. 849.
(2) [1940] A.C. 152.
(3) [1940] W.N. 322.

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Sept. 19, 24. Oct. 18.

Employer and workman—Compensation—Workmen's Compensation Act (Northern Ireland), 1927—Contract of service made in Northern Ireland with employer resident there—Injury to workman in Eire—Jurisdiction—Payment of compensation by employer—Waiver—Estoppel.

By an agreement made in Northern Ireland the applicant was employed by the respondent, who resided in Northern Ireland, to do certain work in Eire. The applicant was injured by accident arising in the course of his employment in Eire. The respondent paid the applicant as compensation the sums to which he would have been entitled if he had been within the Workmen's Compensation Act (Northern Ireland), 1927, for fifteen months except one week during which he employed him; he then again employed him; eventually he discharged him and refused to pay any further compensation. The applicant applied to the Recorder of Belfast to settle by arbitration under that Act the question of the liability of the respondent to pay compensation.

Held, that the Recorder of Belfast had no jurisdiction to deal with the matter.

Held, also, that the jurisdiction of a County Court Judge under the Workmen's Compensation Act (Northern Ireland), 1927, cannot be enlarged by the conduct of either of the parties.

APPEAL from the Deputy Recorder of Belfast who held that the Recorder had no jurisdiction to deal with an application by the appellant to the Recorder to settle by arbitration under the Workmen's Compensation Act (Northern Ireland), 1927, the question of the liability of the respondent to pay him compensation under that Act.

The facts appear in the judgment of Andrews, L.C.J.

Campbell, K.C. and *Agnew* for the appellant:—

The liability to pay compensation attached to the contract of employment which was made in Belfast; the earning of wages began in Belfast. With certain specified exceptions the Workmen's Compensation Act (Northern Ireland), 1927, applies to workmen in any employment, including seamen and aircraft workers,

with modified remedies in aid of those two classes of workers. The Act gave the workman a right to insurance against incapacity caused by accidental injury whether within or without the jurisdiction. The appellant is not seeking to apply the Act extra-territorially, but to apply it to the relations between him and the respondent, both residing in Northern Ireland. The *lex loci contractus* governs the obligations arising from the contract.

In *Keegan v. Dawson* (1) the Supreme Court of the Irish Free State decided that a workman was entitled to compensation when he and his employer are resident and domiciled in the Free State and the contract was made and the services substantially to be performed there, although the accident happened in England. In *Scanlon v. Hartlepool Seatonia Steamship Co.* (2), the respondents were an English company without any registered office in the Irish Free State, and a workman who had been employed by them in Dublin was injured by accident while unloading one of their ships there, and it was held by the Supreme Court of the Irish Free State, that the Circuit Court had jurisdiction to decide the question of the respondents' liability to pay compensation. In *Buckley v. Commissioners of Public Works in Saorstat Eireann and the Minister for Railways and Canals of Canada* (3), the Minister had hired from the Commissioners a steam tug, and had employed in Eire an engineer who was injured in the St. Lawrence river, and it was held by the Circuit Court of the Irish Free State that it had such jurisdiction.

In *Hunter v. Städtische Gesellschaft* (4), Pollock, M.R., said that "the terms of the Act bring within its ambit "all contracts of employment in Great Britain."

The Fatal Accidents Acts, 1846 and 1864, apply as well for the benefit of the representatives of a deceased foreigner as for those of a British subject, at all events as against an English wrongdoer. *Davidsson v. Hill* (5).

The Workmen's Compensation (Anglo-French Convention) Act, 1909 (9 Edw. 7, cap. 16) was a

(1) [1934] I.R. 232.
(2) [1929] I.R. 96.
(3) 65 I.L.T.R. 54.
(4) [1925] 2 K.B. 493, 499.
(5) [1901] 2 K.B. 606.

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legislative declaration that British workmen accidentally injured in France were in certain conditions within the benefit of the Workmen's Compensation Act of 1906.

By the (British) Workmen's Compensation Act, 1925, sec. 37, it was enacted that, for the purpose of giving effect to any Convention with a Foreign State providing for reciprocity in matters relating to compensation to workmen for injuries by accident, it should be lawful by Order in Council to make provision for conferring on county courts powers for the admission of evidence taken abroad; this section was made applicable to Northern Ireland in the case of any such Convention which extends to Northern Ireland, by sec. 37 of the Workmen's Compensation Act (Northern Ireland), 1927.

By payment of compensation the respondent has waived his right to dispute the jurisdiction, or is estopped from denying it; the applicant was prejudiced by being precluded through lapse of time from availing himself of sec. 29, sub-sec. 2, of the Workmen's Compensation Act (Northern Ireland), 1927. *Rees v. Imperial Navigation Coal Co.* (1); re *Orr-Ewing* (2).

[They also referred to the Aircraft Order (Northern Ireland), 1934, and to *R. v. Owen* (3).]

Fox, K.C. and *Copeland* for the respondent:—

The contract was for the performance of work in Eire. The Act has no application to accidents happening outside Northern Ireland, except in the case of seamen. *Tomalin v. Pearson & Son, Ltd.* (4); *Schwartz v. India Rubber Co., Ltd.* (5). The application of the Act of 1906 to seamen by sec. 7 shows that the earlier Acts did not operate outside the United Kingdom.

In *Keegan v. Dawson* (6) the work was substantially to be performed within Eire.

The legislative powers of the Parliament of Northern Ireland are limited to its own territory; the Govern-

(1) 20 B.W.C.C. 287.
(2) 22 Ch.D. 456.
(3) [1902] 2 K.B. 436.
(4) [1909] 2 K.B. 61.
(5) [1912] 2 K.B. 299.
(6) [1934] I.R. 232.

ment of Ireland Act, 1920, sec. 4, enacts that it shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within its jurisdiction ; it could not confer such a right as that claimed by the appellant. *MacLeod v. Attorney-General for New South Wales* (1).

The respondents' payment of compensation cannot give jurisdiction when the statute gives none.

[They also referred to *Farquharson v. Morgan* (2), *Scanlon v. Hartlepool Seatonia Steamship Co. Ltd.* (3), and *Dutton v. Sneyd Bycars Co., Ltd.* (4).]

Campbell, K.C., (in reply) :—

Sec. 7 of the Workmen's Compensation Act, 1906, only modified the procedure in the case of seamen ; they were already within the Act.

Cur. ad. vult.

ANDREWS, L.C.J. : On 8th January, 1939, the respondent, who is a master-steeplejack, residing in Belfast, met the applicant in a street in Belfast and engaged him to leave with him on the following day for work which was to be performed at various places in Eire, wages to commence on the morning the applicant left Belfast. They made their journey with other workmen by car to Wexford, thence to Cork, and afterwards to Fore, in Co. Westmeath. Upon 30th January the applicant, whilst working at the roof of a Roman Catholic Church, met with an accident which for our present purpose at least must be assumed to have arisen out of and in the course of his employment. On the following day he returned to Belfast, and for almost fourteen months he received compensation at the rate at which he would have been entitled to receive it if he had been within the Workmen's Compensation Act (Northern Ireland), 1927. The respondent then gave him light work on the ground for one week ; and this was followed by another five weeks' compensation at the same rate

(1) [1891] A.C. 455.
(2) [1894] 1 Q.B. 552.
(3) [1929] 1 I.R. 96.
(4) [1920] 1 K.B. 414.

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as previously. He had then a further three weeks' light work at Newtownards, but eventually was paid off on 24th May, 1940, and compensation was subsequently refused. Thereupon, he made an application to the Recorder of Belfast for arbitration under the Workmen's Compensation Acts. This application was heard at the Recorder's Court on 20th June, when the only contested issue was the jurisdiction of the Court to hear the claim, the submission made on behalf of the respondent being that on the facts of the case the Court had no jurisdiction to make an award in respect of the accident which had occurred in Eire outside the territorial limits of Northern Ireland. Counsel for the applicant challenged this proposition, and also submitted that there was waiver of the point as to jurisdiction by the payment of compensation and by the cross-examination of the applicant's witnesses. It is these two points—the jurisdiction of the Recorder's Court and waiver—upon which alone we are called upon to express our opinion in this Court. In this connection I wish to make it absolutely clear that we are not required nor do I intend to express any opinion as to whether compensation is recoverable elsewhere. *Scanlon v. Hartlepool Seatonia S.S. Co.* (1), if rightly decided, may warrant the making of such an award in Eire.

Mr. Campbell, at the outset of his argument for the applicant, pressed upon us the fact that jurisdiction would have been clear had the applicant met with his accident whilst travelling in the motor through Northern Ireland before it reached the Border. Whilst this may well be so, it affords no assistance to me in the determination of the present case in which the accident occurred outside territorial limits in Eire, where, under the contract of employment, the work was alone to be performed.

This important question of jurisdiction must be considered both upon the Statutes and upon authority. As to the former we are mainly concerned with the Workmen's Compensation Act (Northern Ireland), 1927 ; but the full effect of its provisions cannot be

(1) [1929] I.R. 96.

appreciated without a careful consideration of the provisions of the earlier Acts. Section 1 of the Act of 1897 imposed a liability on employers, subject as therein mentioned, to workmen in their employment in respect of injuries by accident arising out of and in the course of such employment. The section was limited in its scope and operation to employment to which the Act applied, and such employment was defined by section 7 of the Act. However, neither that section nor any other section of the Act contained any express territorial limitation. The Act of 1900 likewise applied only to certain specified employments. This was entirely altered by the Act of 1906 which was made applicable to all employments subject to certain exceptions therein mentioned. Here again we find no provision expressly defining the area within which the Act was to operate. Yet some limitation must be imposed upon the universality of the language of the Act which otherwise would apply to all employers and all workmen everywhere. In my opinion considerable light is thrown upon the point by the introduction of a new section (s. 7) which, subject to the modifications therein mentioned, made the Act applicable to certain specified persons in the sea and sea-fishing services provided they were workmen within the meaning of the Act and were members of the crew of any ship registered in the United Kingdom, or of any other British ship of which the owner or manager resided in the United Kingdom. By this provision Parliament's interpretation of its earlier Statutes and its intention in regard to the scope of the new Act becomes clear. As a matter of legal draftsmanship I am definitely of opinion that the section was intended by Parliament to be, and that it in fact was, an extension of the provisions of the earlier Acts.

It is argued that section 7 does not bring the seamen therein referred to within the Act—that it, in fact, only introduces a modification of procedure in the case of seamen who are entitled *aliunde* to the benefits of the Act. I cannot accept this view. The words of the section are :—" *This Act shall apply* to . . . seamen

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". . . . subject to the following modifications . . ." I interpret those words according to what appears to me to be their natural meaning as both conferring a right and as modifying the specified procedure provisions in relation to those workmen who are entitled to benefit thereunder. There would be no legal justification for construing such clear and unambiguous words as if they were:—"*In the application of* this "Act to seamen . . . . the following modifications "shall be made"; and it would, in my opinion, be doubly dangerous thus to redraft the section, and then to argue from it in its altered form that it bore internal evidence that seamen were already within the scope of the Act.

If, then, the view which I have expressed is the correct interpretation of the section, namely, that section 7 was necessary to make the Act apply to seamen, it follows that Parliament could not have considered that the earlier Acts had the world-wide application contended for. I would add that the express references in the section to the United Kingdom in regard to registration of the ships or residence of their owners is, in my opinion, of material assistance when we are seeking the intention of Parliament in regard to the general scope of the Act.

The corresponding section of the Act of 1925 (s. 35), passed by the Parliament of the United Kingdom, preserves by sub-section (1) this right in favour of seamen; but, again, following the general trend of the legislation, it extends its provisions by sub-section (4) so as to include other classes of persons employed on board any such ship. This Act, however, contains another important section relevant to our present enquiry—section 36—which confers upon the Secretary of State power by order to extend the provisions of the Act, subject to modification and exception, to persons employed as pilot, commander, navigator or member of the crew of any aircraft to which the section applies when outside Great Britain in such circumstances as might be specified in the order. Here again we find in sub-section (2) a provision corresponding to that in the case of ships limiting the

aircraft to such as are registered in the United Kingdom, and the owners of which reside or have their principal place of business in Great Britain. All that I have said as regards the inferences to be drawn from Parliament's consideration for the necessity for section 35 applies with equal force to section 36.

In Northern Ireland the law in regard to Workmen's Compensation was consolidated by the Act of 1927, which, though not identical with the Act of 1925 of the Parliament of the United Kingdom, yet follows closely its provisions. One reason for departing somewhat from the English Act was that certain provisions which it contained (referred to as "the "reserved provisions") related to matters in respect of which the Parliament of Northern Ireland had not power to make laws—a not unimportant fact in relation to our present enquiry. Here, again, we have under the same numbers as in the English Act sections relating to persons employed on ships and in aircraft; and it is significant to note that section 35 of the Northern Ireland Act refers to section 35 of the Act of 1925 as "conferring"—not, be it noted, as "limiting" or "modifying"—the right to compensation on persons employed on ships.

I, accordingly, find in the several Acts of both Parliaments to which I have referred sufficient evidence of territorial limitation restricting their operation, save where otherwise expressly provided, to, at the most, accidents occurring within the United Kingdom. It never was intended that such domestic legislation should have universal or world-wide application. When the Act of 1906 was passed into law, and Great Britain and Ireland constituted one United Kingdom, its natural sphere of operation, save where otherwise expressly provided, was the United Kingdom; and this is the interpretation which has been consistently put upon it by the English Courts.

The first case in which the point was considered was *Tomalin v. Pearson & Son, Ltd.* (1), in which the Court of Appeal held that the Act of 1906 had no application outside the territorial limits of the United

(1) [1909] 2 K.B. 61.

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Kingdom except in the case of seamen and apprentices as provided by section 7. Accordingly, the widow of an English workman, who had been sent out by his employers to work for them at Malta where he met with a fatal accident, was held not entitled to recover compensation. Basing its opinion primarily on the presumption referred to in *Maxwell on the Interpretation of Statutes*, the Court held that Parliament had not designed the Statute to operate beyond the territorial limits of the United Kingdom; but, in the second place, the Court found support for this opinion in the effect of section 7 of the Act to which I have already referred. Fletcher Moulton, L.J., expressed himself in language free from all possible ambiguity when he said:—"The accident must be one happening in the "United Kingdom to a person there who has the status "of a workman to some employer who, in some way "or another, is made liable to the jurisdiction of this "Act"; and Farwell, L.J., was equally emphatic when he declared that "the words 'any employment' there "(i.e. in section 1) must be restricted to employment "within the ambit of the United Kingdom or on the "high seas as provided by section 7." The generality of the term "workman" in section 13 is limited, he considered, by the restriction of the term "employ-"ment" apparent from the rest of the Act.

Tomalin's case (1), which carries with it the added weight of having been decided upwards of thirty years ago, was followed and approved of by the Court of Appeal in *Schwartz v. India Rubber, etc., Co., Ltd.* (2), in which Buckley, L.J., impressed with the importance of the argument upon section 7, expressed his concurrence regarding the territorial limitation established by the earlier decision.

The soundness of these authorities has apparently never since been successfully impeached in England. On the contrary *Tomalin's case* (1) was expressly approved of by Lord Atkinson, who delivered the opinion of the Privy Council in *Krzus v. Crow's Nest Pass Coal Co., Ltd.* (3), at p. 597; and the proposition

(1) [1909] 2 K.B. 61.
(2) [1912] 2 K.B. 299.
(3) [1912] A.C. 590.

laid down in the cases to which I have referred is cited as settled law in the leading text books. As these authorities are, however, not binding on this Court, Mr. Campbell in his argument for the applicant has not hesitated to condemn them, and has asked us to hold that they were wrongly decided. In support of his view he has cited to us two main authorities—*Hunter v. Stadtische, etc., Gesellschaft* (1), and *Keegan v. Dawson* (2). In the former of these cases it was held that the Workmen's Compensation Acts applied to a foreigner resident abroad who employed the applicant as a coal trimmer whilst his vessel was lying at South Shields. The argument that, because the Workmen's Compensation Acts apply to a foreigner in respect of an accident which occurs within the jurisdiction, they therefore must apply to a citizen of the United Kingdom in respect of an accident occurring outside that Kingdom is to me quite illogical and unconvincing; and the words of Pollock, M.R., on page 499, which were strongly relied upon by Mr. Campbell—that the terms of the Act bring within its ambit all contracts of employment in Great Britain—cannot be divorced from the facts of that case and applied to other facts which were not within the contemplation of the learned Judge. A subsequent passage in the judgment of the learned Master of the Rolls, at p. 502, and a further passage in the judgment of Warrington, L.J., at the foot of page 503, alike stipulate as one of the conditions of the application of the Acts that the accident must arise out of and in the course of employment "in this "country." Finally, Atkin, L.J., states at p. 507 that "the operation of the Acts is confined to employ-"ment within the territorial limits." The opinions thus expressed by the several members of the Court make me regard the case as rather an authority against than one in favour of the contention put forward by Mr. Campbell.

I pass over *Scanlon v. Hartlepool Seatonia S.S. Co.* (3), merely stating that in it the Free State Court, consisting of Sullivan, P., and O'Byrne, J., expressly

(1) [1925] 2 K.B. 493.
(2) [1934] I.R. 232.
(3) [1929] I.R. 96.

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approved of the decision in *Tomalin's case* (1), and I turn finally to *Keegan v. Dawson* (2), in which the majority of the Judges of the Supreme Court of the then Irish Free State (Kennedy, C.J., and Fitzgibbon, J., Murnaghan, J., dissenting) declined to follow the *Tomalin* (1) and *Schwartz* (3) *cases*. The facts of that case appear to me to differ in at least one important respect from those of the present case, namely, that. although the accident occurred outside the territorial limits of the Irish Free State, the service which the applicant contracted to perform was substantially to be performed in the Irish Free State; and both Kennedy, L.C.J., and Fitzgibbon, J., reserved for future consideration a case such as the present, in which the service was to be rendered entirely in a foreign country. But after the full argument addressed to us I feel that I should not allow either this difference in the facts or the reservation of the learned judges to deter me from expressing the opinion that if it were necessary to decide between *Tomalin's case* (1) and *Keegan v. Dawson* (2), I should prefer to follow the former. In arriving at this conclusion I have been assisted by the reasoning of Murnaghan, J., who only concurred with the decision of the other members of the Court on a wholly different ground inapplicable to the present case. The so-called "hard cases" referred to by Fitzgibbon, J., at p. 250, which, in truth, result simply from the Irish Free State, or, as it is now styled, Eire, passing and procuring legislation which has put itself outside the United Kingdom, cannot possibly affect the construction or scope of an Act of Parliament such as the Workmen's Compensation Act, 1906, which was passed many years prior to the dismemberment of the United Kingdom as it then existed.

I wish to add that Mr. Fox presented also an entirely independent argument based upon the limited legislative powers conferred upon the Parliament of Northern Ireland by section 4 (1) of the Government of Ireland Act, 1920, that section expressly providing

(1) [1909] 2 K.B. 61.
(2) [1934] I.R. 232.
(3) [1912] 2 K.B. 299.

that such Parliament shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction. Such limitation of powers in regard to the law of Workmen's Compensation is well illustrated by the special additional powers which were sought and conferred upon the Parliament of Northern Ireland by section 2 (3) and (4) of the Northern Ireland (Miscellaneous Provisions) Act, 1928. The argument was weighty, deriving much support from the opinion of Lord Halsbury, L.C., in *MacLeod v. Attorney General for New South Wales* (1) (at p. 457); and I entirely failed to appreciate any satisfactory answer to it in Mr. Campbell's reply. Our Act of 1927 never applied, nor was it intended to apply to Eire.

I am therefore of opinion that the learned Deputy Recorder of Belfast was right in his decision that he had no jurisdiction to hear the case; and I likewise concur in his opinion that such jurisdiction was not conferred either by the payment of compensation under the Act or by the cross-examination of the applicant's witnesses at the hearing. Whilst it is true that mere irregularities of procedure may be waived, it is equally clear that neither waiver nor estoppel, by whichever name it be called, can create jurisdiction. If authority be required for this proposition I would refer upon the general law to *Farquharson v. Morgan* (2), and *Smythe v. Wiles* (3), and as regards Workmen's Compensation law to *Standing v. Eastwood & Co.* (4), and *Dutton v. Sneyd Bycars Co., Ltd.* (5), in which latter case Atkin, L.J. (as he then was), said (at p. 421) that "employer and workman cannot by agreement "give one another rights under the Act which are not "given by the Act, nor can they give to the county "court judge jurisdiction to determine under the Act "disputes which are not under the Act."

For these reasons I am of opinion that the appeal should be dismissed with costs.

(1) [1891] A.C. 455.
(2) [1894] 1 Q.B. 552.
(3) [1921] 2 K.B. 66.
(4) 5 B.W.C.C. 268.
(5) [1920] 1 K.B. 414.

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BABINGTON, L.J. : I concur. This case cannot be distinguished from *Tomalin v. S. Pearson & Son, Ltd.* (1).

The respondent entered into a contract to do certain work in Eire and engaged the appellant by contract in Northern Ireland, and he went to Fore in the County Westmeath and did his work there for some time, and in the course of that work he met with an accident in respect of which he brought a claim under the Workmen's Compensation Acts (Northern Ireland), 1927 to 1931. These are the facts in *Tomalin's case* (1), as stated by Cozens Hardy, M.R., the names alone being changed.

The Deputy Recorder of Belfast dismissed the claim on the ground that as the accident occurred outside Northern Ireland he had no jurisdiction.

He based his decision on *Tomalin's case* (1), which was followed in *Schwartz v. India Rubber Gutta Percha & Telegraph Works Co.* (2), and approved of by the Privy Council in *Krzus v. Crow's Nest Pass Coal Co., Ltd.* (3), and the English Court of Appeal in *Hunter v. Stadtische Hochsee-fischerei Gesellschaft* (4), took the same view, Lord Atkin (then Atkin, L.J.) saying at page 507 ; " The operation of the Acts is confined to " employment within the territorial limits." These authorities are conclusive in the respondent's favour if we must follow them or if they are sound.

We were, however, referred to the case of *Keegan v. Dawson* (5), a decision of the Supreme Court of the then Irish Free State, in which that Court refused to follow this line of authorities, and we were pressed to take the same course on the ground that *Tomalin's case* (1) was wrongly decided.

This Court is not bound to follow the English Court of Appeal but does so as a matter of practice and in order to maintain uniformity of decision unless it entertains a very strong opinion to the contrary, and when a case has been as long on the books as *Tomalin's case* (1), not only without dissent but with unqualified

(1) [1909] 2 K.B. 61.
(2) [1912] 2 K.B. 299.
(3) [1912] A.C. 590.
(4) [1925] 2 K.B. 493.
(5) [1934] I.R. 232.

approval, a very strong case would have to be made out to induce us to disregard it.

The basis of the decision in *Tomalin's* case (1) was that " In the absence of an intention clearly expressed " or to be inferred from its language or from the object " or subject matter or history of the enactment, the " presumption is that Parliament does not design its " statutes to operate beyond the territorial limits of " the United Kingdom." This proposition was adopted from a passage in *Maxwell on the Interpretation of Statutes*, and the Court of Appeal, having approved of it, went on to hold that there was nothing in the Workmen's Compensation Act, 1906, to rebut this presumption.

In that case, as in the present one, the contract of service was entered into and the parties were resident within the territorial limits but the accident in respect of which the application was brought occurred in Malta. To apply the Act in these circumstances clearly makes it operate outside the United Kingdom, and this is the basis of the decision in *Tomalin's case* (1).

Fletcher Moulton, L.J., says : " The accident must " be one happening in the United Kingdom," and Farwell, L.J., says : " The words ' any employment ' " there (i.e., in section 1 of the Act of 1906) must be " restricted to employment within the ambit of the " United Kingdom." which is the same thing, because the Lord Justice is speaking of employment as meaning the actual work being performed out of and in course of which the accident must arise and not of the contract of employment in pursuance of which the work is done. Fitzgibbon, J., in *Keegan v. Dawson* (2), does not accept this, holding, as I understand him, that the Act does not operate outside the territorial limits because the right to compensation is attached by the statute to the contract of employment, which was made within the United Kingdom.

With the greatest respect for the opinion of so eminent a judge, I think this is wrong and that the right to compensation arises from the accident, which

(1) [1909] 2 K.B. 61. (2) [1934] I.R. 232.

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happened outside the territorial limits, and to succeed the appellant must therefore show that the Act operates outside the territorial limits and this is altogether a matter of construction.

That an Act may operate outside the territorial limits is not in doubt, and it has not been suggested that Parliament cannot legislate for its subjects anywhere. This was expressly affirmed by His Majesty's Judges in *The Trial of Earl Russell* (1).

But the issue here is whether Parliament by the Workmen's Compensation Act has or has not legislated for its subjects outside the United Kingdom, which is a matter of construction to be ascertained from the Statute itself, and the surrounding circumstances, and the effect of *Tomalin's* case (2) is that the onus of establishing the extra territorial application is on the applicant.

Approaching the Statute with this salutary rule in mind there is, in my opinion, nothing in the Statute itself which shows that Parliament intended it to operate outside the United Kingdom, but on the contrary there are provisions which are conclusive the other way.

I will refer to them later but before doing so I will deal with the surrounding circumstances or, as they are described in the passage from Maxwell, the object or subject matter or history of the enactment.

Assuming the language of the statute to be neutral, do the surrounding circumstances compel us to give an extended construction to its provisions ? Again I am satisfied that they do not.

Fitzgibbon, J., in his exhaustive judgment in *Keegan v. Dawson* (3), says that he refuses " to impute " to the legislators who passed the Workmen's Com- " pensation Act an intention to create the hardships " and absurdities which are necessarily involved in the " construction for which the respondent contends, " when the language of the statute is susceptible of an " interpretation which will avoid them all and which " is in complete accordance with what I believe to

(1) [1901] A.C. 446.
(2) [1909] 2 K.B. 61.
(3) [1934] I.R. 232.

" be ' the history, the object, and the subject matter " ' of the Act.' " The hardships and absurdities which the learned Judge sets out at p. 250 are no doubt impressive and very real, but so far as this Island is concerned they were created, not by the Workmen's Compensation Act, 1906, which applied to all Ireland, but by Article 1 of the Second Schedule to the Irish Free State Constitution Act, 1922 (Sess. 2), which conferred Dominion Status on the Irish Free State whereby it ceased to be part of the United Kingdom, and if the so-called hardship be one arising in respect of a workman employed in territory which was never part of the United Kingdom, as in *Tomalin's case* (1), I would observe that the object of the Act was to confer certain new rights on workmen injured within the United Kingdom, and the fact that others do not participate in these rights can hardly be said to be a hardship due to the Act since it neither improved or worsened their position in any degree.

In my view *Tomalin's case* (1) was rightly decided though I do not think the argument founded on section 7 adds to its authority. Section 7 is either an extension of an Act limited in its operation to the United Kingdom to accidents happening to seamen on the high seas, as Cozens Hardy, M.R., thought, or a special provision for claims by seamen who were already within an Act unrestricted in its operation, as Fitzgibbon, J., says in *Keegan v. Dawson* (2). The section, taken by itself, may be read either way and is therefore neutral, so that the ambit of the statute must be ascertained *aliunde* before it is possible to say which construction is correct.

But this does not affect the basis of the Master of the Rolls' judgment, namely, that the presumption is that the Act does not operate beyond the United Kingdom, and, apart from the so-called hardships of which this case is said to be an example, I have not heard any argument founded on the statute itself which suggests that it has any operation outside the United Kingdom, and in the absence of any such indication in the statute the respondent must succeed.

(1) [1909] 2 K.B. 61. (2) [1934] I.R. 232.

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But as I have said, there are indications in the Act that its operation was intended to be limited to the United Kingdom. I will not deal with them all; section 15 is an example. Its provisions cannot apply outside Northern Ireland even between citizens of Northern Ireland. Again I think section 30 (section 6 of the Act of 1906) must have been framed on the assumption that the Act has no application outside the United Kingdom. If the accident occurs as here in Eire and the workman has a claim against a third party there, I cannot see how the claim to the indemnity under section 30 (*b*) could be settled by action in Northern Ireland if the plaintiff was employed in Eire and injured in Eire by the act of a citizen of Eire.

Finally, section 36 is conclusive. Whatever view may be taken of section 7 of the Act of 1906, now embodied in the Northern Ireland Act by section 35 (1), it is not arguable that section 36 (1) does not purport to give power to extend the provisions of the Act to the pilot, commander, navigator or member of the crew of any aircraft when outside Northern Ireland, and this can only be on the basis that otherwise the Act would not so apply. So that, whatever may be said about section 7 of the Act of 1906, it is clear that the Legislature in 1927 recognised the law to be as laid down in *Tomalin's case* (1) and made special provision for aircraft.

This extension of the Act of 1906 was first enacted in the Workmen's Compensation (Miscellaneous Amendments) Act (Northern Ireland), 1927, section 7, which was an Act introducing various amendments into the Workmen's Compensation Code preparatory to the consolidation which was effected by the subsequent Act of the same year. The corresponding section applying to Great Britain is section 36 of the Workmen's Compensation Act, 1925, which was in force when the Northern Ireland Amendment Act was passed, and the extension of the Northern Ireland Act was probably thought to be justified by the provisions of the Northern Ireland (Miscellaneous Provisions) Act, 1928, passed in the Imperial Parliament, but, whether

(1) [1909] 2 K.B. 61.

this is sound or not, these two sections undoubtedly show that both Parliaments considered that the Workmen's Compensation Acts have no application outside the territorial limits.

Further the history of the Act confirms this view. The Act of 1906 replaced the Workmen's Compensation Act, 1897, which it repealed, and a perusal of section 7 of that Act defining the employment to which the Act applies shows that it was complementary to a large body of legislation designed to improve the working conditions of labour in the United Kingdom, and I cannot read that section as having any application outside the United Kingdom.

The Act of 1900 extended the Act of 1897 to workmen employed in agriculture, again necessarily in the United Kingdom, and the Act of 1906 applies generally to all employment, including agriculture, and in the absence of express provision to the contrary, it is to be presumed that the Legislature did not intend to depart from the policy of the earlier Acts and make the Act of 1906 operate outside the United Kingdom.

During the argument the point was taken that the Parliament of Northern Ireland is a subordinate Parliament and cannot legislate in respect of its subjects beyond its own borders, *McLeod v. Attorney-General for New South Wales* (1).

On this principle we were asked to hold that the Workmen's Compensation Act (Northern Ireland), 1927, is *ultra vires* in so far as it purports to operate outside the United Kingdom.

In the view we have taken it is unnecessary to decide this but, as the right of the Parliament of Northern Ireland to apply this Act to accidents which take place in England when the master and workman are both citizens of Northern Ireland and the contract of service was entered into in Northern Ireland may be involved, I think it is necessary to say that we have not considered this and I pronounce no opinion upon it.

At the passing of the Government of Ireland Act, 1920, the Act of 1906 applied over the whole United Kingdom, and by the Workmen's Compensation Act,

(1) [1891] A.C. 455.

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1925, section 48 (1), United Kingdom in these Acts now means Great Britain and Northern Ireland, and this is repeated in section 49 (1) of the Northern Ireland Act, 1927.

Presumably the Act of 1906 applied in both jurisdictions until repealed, and it may be that when two new Acts took its place they operated as formerly over the whole United Kingdom subject to the differences in the forum of administration, and that in this case also section 2 (3) of the Northern Ireland (Miscellaneous Provisions) Act, 1928, conferred powers on the Parliament of Northern Ireland to so legislate.

The solution of this difficulty, if it be one, will have to wait until it arises directly at some future time.

MURPHY, L.J.

MURPHY, L.J.: I concur.

Two main questions arise for our decision on a consideration of the interesting arguments which have been addressed to us.

First, does the *ratio decidendi* in *Tomalin v. Pearson* (1) apply to the present case, and secondly, if it so applies, should we follow that decision? Notwithstanding the forcible arguments of Mr. Campbell, I have arrived at the clear conclusion that both these questions should be answered in the affirmative, and that, accordingly, this appeal must fail.

Tomalin's case (1) was a decision on the scope of the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), while we are considering the scope of the Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 16)—to which I shall refer as "the 1927 Act"—but the material words of section 1 (1) of the 1927 Act are identical with those of section 1 (1) of the Workmen's Compensation Act, 1906. In *Tomalin's case* (1) the workman was engaged in England by the well-known firm of contractors (S. Pearson & Son, Ltd.), who had entered into a contract for the erection of certain works in Malta, to proceed to Malta and to work as a fitter there. His passage out was paid, he was to receive 25*s.* 0*d.* a week during the time he was on the journey, he was to receive

(1) [1909] 2 K.B. 61.

£2 10*s.* 0*d.* a week while working in Malta, and his passage home was to be paid at the conclusion of satisfactory service. The workman was killed in Malta by an accident arising out of and in the course of his employment, his widow claimed compensation, the County Court Judge held that the applicant was entitled to compensation, and this decision was reversed by Cozens Hardy, M.R., and Fletcher Moulton and Farwell, L.JJ. The decision of the Court of Appeal is, in my opinion, correctly summarized in the Head Note as follows :—" The Workmen's Compensation " Act, 1906, has no application outside the territorial " limits of the United Kingdom, except in the case of " seamen and apprentices as provided by section 7."

The only distinction between the facts in *Tomalin's case* (1) and those in the present case is that here the workman went to Eire and not Malta, and that it is the workman himself (having met with an accident while engaged in his work as a steeplejack at Fore, County Westmeath) and not his widow who is applying for compensation. I do not think that *Tomalin's case* (1) can be distinguished on either of these grounds.

Whatever may be the present constitutional status of Eire, it has ceased to be part of the United Kingdom, the Act of 1927 never applied to Eire (or the Irish Free State), and this Act repealed the whole of the Workmen's Compensation Act, 1906 (save sections 7 and 11 which relate to seamen and the detention of ships), so that the position of the present applicant seems to me not to differ in principle from that of the deceased workman in *Tomalin's case* (1). I also think that, although the present applicant was a party to the contract of employment, in making the present claim he is (in the words of Cozens Hardy, M.R., in *Tomalin's case* (1), at page 64) " simply claiming the " performance by the respondent of a statutory duty, " which statutory duty is said to be found in the " Workmen's Compensation Act."

Accordingly, I hold that *Tomalin's case* (1) cannot be distinguished from the present case.

(1) [1909] 2 K.B. 61.

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Mr. Campbell devoted the greater part of his argument to a criticism of the decision of the Court of Appeal in that case, and, relying on the judgments of Kennedy, C.J., and Fitzgibbon, J., in *Keegan v. Dawson* (1), strenuously urged that we should not follow that decision. In considering this argument, it must be observed that since the date of the decision, *Tomalin's case* (2) was followed in *Schwartz v. India Rubber, etc., Co.* (3), by a Court of Appeal consisting of Cozens Hardy, M.R., Fletcher Moulton, L.J. (who were members of the Court which decided *Tomalin's case* (2), and Buckley, L.J., and that Lord Atkinson giving the judgment of the Privy Council in *Krzus v. Crow's Nest Pass Coal Co.* (4), expressly approved of the decision in *Tomalin's case* (2), but distinguished the case before the Privy Council from the earlier case. It is said that this approval is only an *obiter dictum*, while Mr. Campbell cited authority for the well-established proposition that even a decision of the Privy Council is not binding, but such an expression of approval (in which Lord Macnaghten and Lord Shaw, or one of them, evidently concurred) cannot fail to add weight to the decision of the eminent Judges who decided *Tomalin's case* (2). It would also appear that *Tomalin's case* (2) has been referred to in all the text books as an authority for the limitation of the scope of the Workmen's Compensation Acts. In the Hailsham Edition of *Halsbury's Laws of England* (Volume 34, paragraph 1134) the law has been recently stated in these words :—" The Workmen's Compensa-" tion Act, 1925, has no application to accidents " happening outside the territorial limits of the " United Kingdom except in the case of seamen and " persons employed on certain aircraft ; " *Tomalin's case* (2) and *Schwartz's case* (3) being cited as authorities in the note, which also contains a reference to *Keegan v. Dawson* (1). I assume that this view of the scope of the Workmen's Compensation Act has been acted on since 1909 (this has been admitted in the argument before us), and having regard to the great engineering

(1) [1934] I.R. 232.
(2) [1909] 2 K.B. 61.
(3) [1912] 2 K.B. 299.
(4) [1912] A.C. 590.

works which British contractors have carried out in all parts of the world, the cases affected by this decision must have been numerous. In *Keegan v. Dawson* (1), Murnaghan, J. (dissenting from the majority of the Court on this point) said :—" The decision in *Tomalin's* " *case* (2) has never been questioned in this country " and I should feel it difficult to dissent from a view of " the law which was established from the earliest " interpretation of the Act. But I so entirely agree " with the reasoning on which *Tomalin's case* (1) was " decided that no such consideration need be relied on." With this statement I, respectfully, agree. Kennedy, C.J., evidently considered that the authority of *Tomalin's case* (2) was affected by the fact that in the Sixth (1920) Edition of *Maxwell on Statutes*, and in subsequent editions, the words, " on its subjects " have been added to the passage as cited by Cozens Hardy, M.R., and afterwards by Lord Atkinson. I fail to appreciate the importance of these words, and do not consider that they in any way affect the meaning of the passage, but it is the passage *without* these words which has been cited with approval. There is nothing in *Tomalin's case* (2) which is inconsistent with the principle cited by Fitzgibbon, J., from the judgment of Dr. Lushington in *The Zollverein* (3) : " The power " of this country is to legislate for its own subjects all " over the world." Some limitation must be placed on the words of section 1 (1) of the Act, which would otherwise apply as between an employer and a workman, neither of whom was a British subject, when the accident out of which the claim arose occurred (say) in Peru, provided that the contract of employment was made within the United Kingdom.

I cannot appreciate the distinction so much stressed by Kennedy, C.J., between the principle stated by Cozens Hardy, M.R., and Fletcher Moulton, L.J., and that stated by Farwell, L.J. It is true that Farwell, L.J., uses the words " ' any employment ' there must " be restricted to *employment* within the ambit of the " United Kingdom " while the other two members

(1) [1934] I.R. 232.
(2) [1909] 2 K.B. 61.
(3) Swab. 96.

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of the Court referred to the *accident* as having happened outside the United Kingdom, but in *Tomalin's case* (1) the contract of employment was made in England, and if (as was found) the accident in Malta arose out of and in the course of the workman's employment, the employment as well as the accident can be correctly described as outside the United Kingdom. I do not recognise "the important difference in the reasoning," which Kennedy, C.J., finds in the judgment of Farwell, L.J., nor can I agree with him when he refers (at p. 242) to "Lord Atkinson boldly stating the decision as "resting upon a ground which certainly was not that "given for the opinion of the majority of the Court." It is clear that Lord Atkinson did not discover this, alleged, "difference in the reasoning" between the judgments in *Tomalin's case* (1).

I am clearly of opinion that section 7 of the Workmen's Compensation Act, 1906 (see now section 35 of the 1927 Act) did support the construction put on section 1 (1) of the Act of 1906 in *Tomalin's case* (1), a view which was taken by Cozens Hardy, M.R., and Farwell, L.J., in *Tomalin's case* (1) and Buckley, L.J., in *Schwartz's case* (2).

But if section 7 removed all doubts as to the true construction of section 1 (1) of the Act of 1906, it seems to me that section 36 of the Act of 1927 (which is identical, *mutatis mutandis*, with section 36 of the (English) Workmen's Compensation Act, 1925) makes it still more clear that the construction put upon section 1 (1) of the Act of 1906 in *Tomalin's case* (1) should now be put on section 1 (1) of the Act of 1927. This section 36 expressly enables the Ministry of Labour by order to "*extend* the provisions of this "Act" to persons employed in aircraft when outside Northern Ireland, if they are "workmen" within the meaning of the Act. If the view taken by Kennedy, C.J., and Fitzgibbon, J., were correct this section would be entirely otiose, and any doubt created by the judgments of these two learned Judges is in my opinion completely removed by reference to this section 36.

(1) [1909] 2 K.B. 61. (2) [1912] 2 K.B. 299.

I also think that there is much to be said in favour of the suggestion of Mr. Fox (from whose argument I derived the greatest assistance) that in the case of *Keegan v. Dawson* (1), the fact that " the service was " substantially to be performed in the Irish Free State " (i.e., within the territorial limits of the country in which the contract of service was made and in which the workman and employer were both resident and domiciled) affected the decision of the majority of the Court (see Kennedy, C.J., at p. 244 and Fitzgibbon, J., at p. 251), and that on its facts that case could be distinguished from the present. Furthermore, there is much force in the argument of Mr. Fox that the ambit of the operation of section 1 (1) of the Act of 1927 should be limited to the territorial limits of Northern Ireland having regard to the limitations on the legislative powers of the Northern Ireland legislature imposed by section 4 of the Government of Ireland Act, 1920, and the case cited by him, *MacLeod v. Attorney General for New South Wales* (2) is instructive on this point.

Scanlon v. Hartlepool S.S. Co. (3) would seem to show that the appellant might have obtained an award in the Courts in Eire, but I express no concluded opinion on this subject.

I have considered the terms of the order made pursuant to section 36 of the Act of 1927 with its provisions as to depositions, and the provisions as to depositions contained in section 35 (1) (*d*) of the Workmen's Compensation Act, 1925, but I do not think that these really assist Mr. Campbell's argument ; the special provisions as to workmen employed in aircraft or ships outside Northern Ireland being, as I have said, indicative of the limited ambit of operation of the Statutes in the case of workmen generally.

The argument of Mr. Campbell as to waiver must be rejected, in my opinion. Jurisdiction cannot be conferred by " waiver " : the case cited by him, *Rees v. Imperial Navigation Coal Co., Ltd.* (4) is really an

(1) [1934] I.R. 232.
(2) [1891] A.C. 455.
(3) [1929] I.R. 96.
(4) 20 B.W.C.C. 287.

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authority against his contention (see Lord Hanworth, M.R., at pp. 296, 297, and Lawrence, L.J., at p. 304), while in *In re Orr Ewing* (1) no question of jurisdiction arose.

Solicitors for the applicant: *J. Donnelly & Co.*
Solicitors for the respondent: *Carson & McDowell.*

J. McC.

(1) 22 Ch.D. 456.

In the Matter of an Arbitration between the NORTHERN IRELAND ROAD TRANSPORT BOARD and the CENTURY INSURANCE COMPANY, LIMITED.

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Oct. 1, 2., 3, 23.

Master and Servant—Liability of A. for negligence of his servant employed under the control of B.—Negligence—Dangerous object —Petrol—Smoking—Scope of employment.

By a policy of insurance the Northern Ireland Road Transport Board was indemnified by the C. Insurance Company against loss or damage caused by the use of a certain motor lorry its property, including the loading and unloading thereof, provided that the C. Insurance Company should not be liable in respect of injury or damage caused beyond the limits of any carriage-way or thoroughfare in connection with the bringing of the load to the lorry for loading thereon, or the taking away of the load from it after unloading.

Under an agreement with H. M. D. the Transport Board was bound to deliver petroleum spirit for H. M. D. by tank lorries which were to be loaded at H. M. D.'s installation at L., or such other place as H. M. D. should direct, to keep at L. sufficient lorries to transport such petroleum spirit, to keep it insured while in transit against fire and spillage, to dress all their employees engaged in such delivery in such uniforms and liveries as H. M. D. might direct, and under the said agreement all employees of the applicants engaged in or about the said delivery were to accept and obey the orders of H. M. D. or their representatives regarding such delivery, the payment of accounts and all matters incidental thereto, provided that nothing therein contained should be taken as meaning or implying that such employees of the Transport Board were in any way the employees of H. M. D., and the Transport Board was to be responsible to H. M. D. for all losses which H. M. D. might sustain through any tort, misdemeanour, negligence or default of which any of its employees might be guilty.

On 2nd August, 1937, the lorry driven by D., received 300 gallons of petrol at H. M. D.'s installation at L. for delivery into the storage tank of J. C., at B. D. drove the lorry to B., backed it into C.'s garage, inserted the nozzle of the delivery hose into the manhole of C.'s tank, turned on the stop-cock at the side of the lorry, and the petrol began to flow into the tank ; D., while the petrol was flowing, lit a cigarette and threw the match on the floor of the garage. The match ignited some material on the floor and a fire started forthwith where the nozzle of the hose was discharging into the tank ; D. drove the lorry out of the garage ; when the fore-wheels had reached the water-channel in the street, he stopped the lorry and jumped off it. The fire had pursued the trailing hose

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and the escaping petrol, and an explosion occurred which destroyed the lorry and also a motor car which was standing in the street, and damaged eleven houses; the motor car and the houses were the property of third parties.

Differences arose between the Transport Board and the C. Insurance Company as to the liability of the Company to make good the losses sustained by reason of the damage done to the lorry and to the motor car and the houses, and the matters in dispute were referred to arbitration. The arbitrator stated certain questions of law which arose in the course of the reference, in the form of a special case for the determination of the Court.

Held:—

(1) That D. at the time when the accident happened was acting as the servant of the Transport Board;

(2) That the act of D. in lighting a cigarette and throwing the match on the floor of the garage amounted, in the circumstances, to negligence within the course of his employment for the consequences of which his master was responsible;

(3) That the damage to the property of the third parties, was in the circumstances, caused by the use of the motor lorry, including the loading and unloading thereof, within the meaning of the policy.

APPEAL from a decision of Brown, J., on a Case Stated by an arbitrator under the Arbitration Act (Northern Ireland), 1937.

The facts are stated in the judgment of Andrews, L.C.J.

Whitaker, K.C., Fox, K.C., and *Sheil* (for *L. E. Curran* serving with H.M. Forces), for the Northern Ireland Transport Board.

Davison at the time when the accident happened was acting as a servant of the Transport Board. It is clear from the agreement that the contract was not a contract for the hiring of the man and the lorry but for the carriage of petrol. He was guilty of negligence in lighting a cigarette and throwing the match away when the petrol was flowing from the lorry into the tank; and in smoking while attending to a vehicle carrying petrol he was guilty of a breach of the Petroleum Spirit (Conveyance) Regulations (Northern Ireland), 1937. The facts of this case are the same as those in *Jefferson v. Derbyshire Farmers, Ltd.* (1). In

(1) [1921] 2 K.B. 281.

Williams v. Jones (1) the plaintiff lent his shed to the defendant to make a signboard in it, and a carpenter employed by the defendant, while at work in the shed making the signboard, lighted his pipe with a shaving which he dropped and which set fire to shavings on the ground, with the result that the shed was destroyed, and it was held that the defendant was not liable. But the amount of care which ought to be exercised depends on the circumstances ; there is a special duty to be careful when dealing with things so dangerous in themselves as petrol. To get away from the work on which he is employed a man must proceed on a purpose of his own. If a man driving his master's cart on his master's business makes a detour for purposes of his own, he is still doing his master's business and his master is still liable for damage caused by his negligent driving. *Joel v. Morrison* (2). In *Gracey v. Belfast Tramway Co.* (3) two servants of the defendants took two horses to a forge to be shod and raced furiously along the street vying who should get there first, with the result that the plaintiff's horse took fright and the plaintiff was thrown out of her trap and injured, and it was held that the defendants were liable. In both these cases, as in the present case, the servant had not ceased to do his master's work when he was guilty of the negligence which caused the damage.

[They referred to *Donovan v. Laing, Wharton and Down Construction Syndicate, Ltd.* (4), *McCartan v. Belfast Harbour Commissioners* (5), *Waldock v. Winfield* (6), *Rourke v. White Moss Colliery* (7), *Bain v. Central Vermont Railway Co.* (8), *Reedie v. London and North Western Railway Co.* (9), *Brownlow v. Metropolitan Board of Works* (10), *Jones v. Mayor, Aldermen and Citizens of Liverpool* (11), *Hardaker v.*

(1) 3 H. & C. 602.
(2) 6 C. & P. 501.
(3) [1901] 2 I.R. 322.
(4) [1893] 1 Q.B. 629.
(5) [1911] 2 I.R. 143.
(6) [1901] 2 K.B. 596.
(7) 2 C.P.D. 205.
(8) [1921] 2 A.C. 412.
(9) 4 Ex. 244.
(10) 16 C.B. (N.S.) 546.
(11) 14 Q.B.D. 890.

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Idle District Council (1), *Honeywill and Stein v. Larkin Brothers, Ltd.* (2).]

Serjeant Sullivan, Warnock, K.C. and *Patton* for the Century Insurance Company :—

The Insurance Company is only liable for damage caused by the use of the lorry ; when the accident happened it was not being used, it was standing motionless ; the act of negligence had no reference to the use of it. The petrol which ignited had left the lorry and so was unloaded, it was being taken away elsewhere ; the damage was caused beyond the limits of the carriageway or thoroughfare in connection with the taking away of the load, and the proviso in the policy exempts the Insurance Company from liability. For the purpose of the unloading and delivery of the petrol Davison was the servant of Holmes, Mullin & Dunn, Ltd., because he was doing a part of his work in the doing of which part he had to accept and obey their orders. *Donovan v. Laing, Wharton and Down Construction Syndicate* (3), *Bain v. Central Vermont Railway Co.* (4), *McCartan v. Belfast Harbour Commissioners* (5).

When Davison had turned on the petrol and started to light a cigarette he was doing something outside the scope of his employment, for the consequences of which neither the Transport Board nor Holmes, Mullin & Dunn were liable.

In *Williams v. Jones* (6) the servant brought the fire to the inflammable material, in *Jefferson v. Derbyshire Farmers, Ltd.* (7) the servant brought the inflammable material to the fire ; that is the distinction between the cases. The facts in the present case are the same as those in *Williams v. Jones* (6).

Cur. ad. vult.

ANDREWS, L.C.J.

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ANDREWS, L.C.J. : This matter came before us by way of appeal from an order of Brown, J., made on 31st July last, on the hearing of a case wnich was

(1) [1896] 1 Q.B. 335.
(2) [1934] 1 K.B. 191.
(3) [1893] 1 Q.B. 629.
(4) [1921] 2 A.C. 412.
(5) [1911] 2 I.R. 143.
(6) 3 H. & C. 602.
(7) [1921] 2 K.B. 281.

stated by Mr. William Lowry, K.C., the arbitrator duly appointed by the parties. The dispute which had arisen between them related to the liability of the respondents (hereinafter called "the Company") under a policy of insurance, dated 29th November, 1935, in respect of an accident, attended with serious consequences, which occurred on 2nd August, 1937, when a petrol motor tanker, the property of the applicants (hereinafter called "the Board"), was delivering a consignment of petrol.

I shall state the material facts as briefly as possible. On 29th November, 1935, a policy of insurance was issued by the Company to the Irish Road Transport Co., Ltd. (hereinafter referred to as "the Irish "Transport Co.") in respect of a petrol tanker of which they were the owners. At the time that this policy was taken out there was in existence an Agreement, dated 11th October, 1934, made between Holmes, Mullin & Dunn, Ltd., of the one part, and the Irish Transport Co. of the other part, which provided for the delivery by the Irish Transport Co. of petroleum spirit for the said Holmes, Mullin & Dunn, Ltd., within Northern Ireland. Both the said policy and Agreement will require more detailed reference later.

The undertaking of the Irish Transport Co. was subsequently acquired by the Board, who thereupon became liable to carry out the Agreement of 11th October, 1934; and by Memorandum, dated 17th June, 1937, indorsed on the policy, it was agreed that as from 30th April, 1937, the interest in the policy became vested in the Board who thereupon became bound by its terms and conditions.

It is found by the learned arbitrator that on 2nd August, 1937, the petrol tanker, which was then the property of the Board and was driven by one Davison, had taken on board a consignment of 300 gallons of petrol at the Larne Depot of Holmes, Mullin & Dunn, Ltd., for delivery into the storage tank of one James Catherwood, Automobile Engineer, Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hose pipe into the manhole of Catherwood's tank, and turned

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on the stop-cock at the side of the tanker. While the petrol was flowing from the tanker into the tank Davison lit a cigarette and threw the lighted match on to the floor. The match ignited some material on the floor of the garage, and a fire was caused forthwith where the nozzle of the delivery pipe was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the flames that appeared at the manhole, at the same time shouting to Davison to turn off the stop-cock. Davison did not do so or attempt to do so, but started up the tanker and drove it out of the garage until the forewheels had about reached the water channel in the street. The fire, although extinguished at the man-hole by Catherwood, pursued the trailing hose and the escaping petrol, and a violent explosion occurred, which destroyed the tanker and Catherwood's motor car which was parked in the street, and also damaged several houses the property of other parties. The claims in respect of the motor and houses were settled for £1,001 16*s.* 7d., which was paid by the company without prejudice to their legal rights.

At the conclusion of the evidence counsel for the respective parties formulated the matters in difference between the parties in the form of the following questions :—

(*a*) Whether Gardiner Davison at the time the accident happened was acting as the servant of the Board or of Holmes, Mullin & Dunn, Ltd. ?

(*b*) Whether the act of Gardiner Davison in lighting a cigarette and throwing the match on the floor of the garage of James Catherwood amounted in the circumstances to negligence within the course of his employment as such servant, for the consequences of which his master was responsible ?

(*c*) Whether the damage to the property of the said third parties was in the circumstances caused by the use of the said tanker (including the loading and/or unloading of such vehicle) within the meaning of section 2, clause 1, of the policy ?

To the first of these questions the arbitrator answered that Davison was the servant of the Board, and he also answered the other two questions in the affirmative, awarding that the sum of £1,001 16*s.* 7*d.* paid by the Company was due by and properly payable by them, and that the sum of £350, the agreed value of the tanker, was due and payable by the Company to the Board. The question submitted for the decision of the Court was whether upon the facts stated the Company was liable to pay the said sums.

Brown, J., by whom the case was heard in the King's Bench Division, whilst agreeing with the arbitrator in his answers to questions (*b*) and (*c*), held in answer to question (*a*) that Davison was the servant of Holmes, Mullin & Dunn, Ltd. From this latter finding the Board duly appealed to this Court, and the Company thereupon served a cross-notice of appeal against the order to pay the sum of £350 and also against the learned judge's findings upon questions (*b*) and (*c*).

It will now be convenient to refer to the main provisions of the Agreement of 11th October, 1934. By clause 1 the Irish Transport Co. undertook, when requested so to do by Holmes, Mullin & Dunn, Ltd., to deliver petroleum spirit or like products which Holmes, Mullin & Dunn, Ltd., had for disposal, to any destination within Northern Ireland. By clause 2 Holmes, Mullin & Dunn, Ltd. agreed to pay the freights specified in the schedule for such services. By clause 3 delivery was to be made by tank lorries. By clause 4 lorries were to be loaded at the Installation of Holmes, Mullin & Dunn, Ltd., at Larne, or at such other place as they should direct, and the Irish Transport Co. undertook at all times to keep at Larne sufficient tank lorries to transport all petroleum spirit and like products which might be given to them for delivery. If delivery was unreasonably delayed by the fault of the Irish Transport Co., through not having a suitable tank ready or through delay during transit or through any other fault or negligence on the part of the Irish Transport Co., the latter should forfeit the freight. Next follow, in Clause 5, an undertaking by the Irish Transport Co. that they would keep such

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spirit or products insured while in transit against fire and spillage, and an agreement that the Irish Transport Co. would dress all their employees engaged in such delivery in such uniforms and liveries as Holmes, Mullin & Dunn, Ltd. might direct. The Irish Transport Co. further undertook to effect all necessary insurances under the Workmen's Compensation Acts or otherwise, and also to be accountable to Holmes, Mullin & Dunn, Ltd., for the capital value of all products entrusted to them for delivery, and for all losses, whether actual or calculated, which Holmes, Mullin & Dunn, Ltd., might be at by reason of loss, non-delivery or unreasonably late delivery.

All these provisions appear to me to point irresistibly to the conclusion that the Agreement was one of carriage and delivery to be performed by the Irish Transport Co. with their own servants or employees for freight to be charged as in the schedule, the rights of Holmes, Mullin & Dunn, Ltd., being restricted to a determination of the nature and quantity of the motor spirit, and its place of loading and of delivery. It was in no sense a contract for the hiring out of lorries and men or of lending them to Holmes, Mullin & Dunn, Ltd., to enable them to effect delivery of their own motor spirit. Were there nothing more in the Agreement it could not for a single moment be contended that men engaged in the delivery of the motor spirit ever became the servants of Holmes, Mullin & Dunn, Ltd., either generally or for any specified purpose.

But Serjeant Sullivan relied strongly on clause 9, and to a less extent on clause 10, as establishing that, although such employees remained the general servants of the Irish Transport Co., yet, for certain specified purposes, including the unloading or actual delivery of the motor spirit, they became the servants of Holmes, Mullin & Dunn, Ltd. Clause 9 provides that all the employees of the Irish Transport Co. engaged in or about such delivery should accept and obey the orders of Holmes, Mullin & Dunn, Ltd., or their representatives regarding such delivery, the payment of accounts and all matters incidental thereto; and that the Irish Transport Co. should dismiss any employee of theirs

disregarding or failing to obey such orders. Then follows an indemnity by the Irish Transport Co. in favour of Holmes, Mullin & Dunn, Ltd., against all claims, actions and demands arising out of or on account of such dismissal. Next comes a proviso that nothing therein contained should be taken as meaning or implying that such employees of the Irish Transport Co. were in any way the employees of Holmes, Mullin & Dunn, Ltd. Clause 10 is simply a declaration that the Irish Transport Co. should be responsible to and should indemnify Holmes, Mullin & Dunn, Ltd., for all losses which they might sustain . . . through any tort, misdemeanour, nuisance, negligence or default of which any employee of the Irish Transport Co. might be guilty.

Now the principle for which Serjeant Sullivan contended—that the servant of A. may on a particular occasion and for certain specified purposes become the servant of B., notwithstanding that he is paid by A. and continues in his general service—has long been recognised. *Murray v. Currie* (1), *Rourke v. White Moss Colliery Co.* (2), and *Donovan v. Laing, Wharton, etc., Syndicate* (3), are the cases most frequently cited in which this principle was recognised and applied. It was in this latter case that Bowen, L.J., delivered a judgment which has been generally accepted as embodying an accurate statement of the law. "We "have," he said, "only to consider in whose employ- "ment the man was at the time when the acts com- "plained of were done, in this sense, that by the "employer is meant the person who has a right at "the moment to control the doing of the act. That "was the test laid down by Crompton, J., nearly forty "years ago in *Sadler v. Henlock* (4), in the form of the "question, 'Did the defendants retain the power of "'controlling the work?' Here the defendants "certainly parted with some control over the man, "and the question arises whether they parted with "the power of controlling the operation on which the "man was engaged. There are two ways in which a

(1) L.R. 6 C.P. 24.
(2) 2 C.P.D. 205.
(3) [1893] 1 Q.B. 629.
(4) 4 E. & B. 570.

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"contractor may employ his men and his machines. "He may contract to do the work, and, the end being "prescribed, the means of arriving at it may be left "to him. Or he may contract in a different manner, "and, not doing the work himself, may place his "servants and plant under the control of another— "that is, he may lend them—and in that case he does "not retain control over the work."

I fully accept the passage which I have cited as containing an accurate statement of the law. But it must be read in its entirety; and the opening words relied upon by Brown, J., which emphasise the importance of control, must be interpreted in the light of the words which follow. Accordingly, I put to myself the question:—"Did the Board part with the "power of controlling the operation on which Davison "was engaged at the time of the accident?" I answer this question by considering the several matters to which Bowen, L.J., refers. Serjeant Sullivan recognised this when he admitted that one cannot construe the agreement "in the air." One must have regard to all the relevant proved facts. Foremost amongst these matters is the consideration whether the Board were to do the work of transport and delivery themselves, or whether it was to be done by Holmes, Mullin & Dunn, Ltd. Were Holmes, Mullin & Dunn, Ltd., merely to prescribe the end—the quantity of the petrol to be delivered, together with the place from which it was to be taken and the place to which it was to be carried and delivered? or were they also to prescribe the means by which such end was to be arrived at and delivery effected? When I put these questions to myself I have no doubt, both on the terms of the Agreement taken as a whole and in the light of the facts found in the Case Stated, as to how they should be answered. It is our first duty in construing the Agreement so to interpret any ambiguous words such as "shall accept and obey the orders of the said "Holmes, Mullin & Dunn, Ltd., . . . regarding such "delivery" that the entire Agreement may make one consistent whole. This result is best achieved in the present case if the orders to be obeyed are given the

limited interpretation, for this, as it seems to me, is alone consistent with the Transport Board's legal position as independent contractors whose duty it was to deliver the petrol. The learned Serjeant felt compelled to admit that if an accident had occurred on the journey from Larne to Belfast caused by the negligence of Davison, the Board—not Holmes, Mullin & Dunn, Ltd.—would have been liable. The reason for this conclusion is simply that Davison was during such journey their servant and their servant alone, because he was doing their work as independent contractors for which they were to be paid freight. But what was the work for which they were to be paid such freight? It consisted in the loading of the petrol, its transport and delivery at the appointed place. Delivery is not effected by bringing the lorry which contains it into a designated garage. It involves a handing over or a giving up of possession of the petrol. This is done by emptying it out of the tanker through its hose pipe into containers such as tanks. It is only when this operation has been completed that the delivery undertaken by the Board can be said to have been performed and that the right to payment of the freight arises. The operation involves the connecting up of the pipe and the opening of a stop-cock which has subsequently to be closed when the delivery is complete. Such matters are not directed or controlled by Holmes, Mullin & Dunn, Ltd., whose interest in the petrol was purely as consignors, and who, in fact, had no representative of their firm present to give orders in relation thereto. They no more controlled Davison in the means or method of delivery of the petrol at the garage than they controlled him in his driving of the lorry from Larne to Belfast. If it be said that Catherwood was the agent or representative of Holmes, Mullin & Dunn, Ltd., to give orders as to delivery, I reply that he had no interest in the matter except to point out the receptacle or receptacles into which delivery was to be made. He could have had no authority to give orders in regard to the method of performing work undertaken by the Board for reward to them, more especially as for any loss, such as spilling

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of the petrol, incurred in such delivery, the Board would clearly have been liable to Holmes, Mullin & Dunn, Ltd., under clause 12 of the Agreement. Thus it is that I am able to read the proviso to clause 9 as merely declaring, not as altering in any way, the legal position and relation of the parties under the rest of the Agreement. It confirms the contract as a contract of carriage by independent contractors who may reasonably be expected to accept orders as to the end but not as to the means, the methods, or the manner of doing the work. Such a use of the proviso is in my opinion fully warranted by the judgment of Lord Dunedin in *Bain v. Central Vermont Railway Co.* (1) at p. 414.

Placing this construction on the Agreement and taking the view which I have indicated of the facts, I find the present case much more analogous to the case of *Jones v. Mayor, Aldermen and Citizens of Liverpool* (2), in which the owner of a horse contracted with the defendants to supply by the day the horse with a driver to draw a watering-cart belonging to the defendants. The man so supplied was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart, the Court, applying the principle of the carriage cases, *Laugher and Pointer* (3), and *Quarman v. Burnett* (4), held the defendants not liable. In emphasising the limited control and discretion exercised by the defendants, Grove, J., pointed out that if the defendants' inspector had interfered when the accident happened by directing the driver of the cart what to do the case would have been different.

I do not wish unnecessarily to multiply the citation of authority on this branch of the case. I should like, however, to say that the conclusion which I have expressed derives material support from *Reedie v. London and North Western Railway Co.* (5), and *Steel*

(1) [1921] 2 A.C. 412.
(2) 14 Q.B.D. 890.
(3) 5 B. & C. 547.
(4) 6 M. & W. 499.
(5) 4 Ex. 244.

v. South Eastern Railway Co. (1), cases which have been frequently cited with approval, and whose authority cannot be questioned. I would also call special attention to *Cameron v. Nystrom* (2), in which the judgment of the Privy Council was delivered by Lord Herschell, L.C. That was an action to recover damages alleged to have been caused by the negligence of the defendant's servant. The defendants were stevedores employed to discharge the vessel at a tonnage rate, and the plaintiff was a servant of the ship master on whose ship the injury was caused. The vessel was to find the gear, but the stevedores brought their own men, foreman and workmen to effect the discharge. The person whose negligence caused the accident was the foreman of the defendants who rigged up the gear. The defence of common employment disappeared out of the case as the result of the decision of the House of Lords in *Johnson v. Lindsay* (3), and the only defence which then remained was that the foreman was not at the time of the accident really acting in the service of the defendants but as the servant of the shipowner. This defence failed; for the foreman was not only employed and paid by the stevedores, but at the time when he was doing the work in question he was doing it for the stevedores who were being paid a lump sum for the discharge of the vessel. My special reason for citing the case is the passage in the Lord Chancellor's judgment to be found at p. 312 of the report, which appears to me to have a special bearing upon the present case. "Reliance," he said, "was placed upon "expressions used in the evidence, with regard to the "extent to which the mate and master had the right to "direct and control the acts of the stevedores' servants. "That does not seem to their Lordships in the least "inconsistent with their being the servants of the "stevedores, and not the servants of the shipowner. "There was no express agreement with regard to the "extent to which the master and mate should have "control over them. That control is only to be "implied from the circumstances in which they were

(1) 16 C.B. 550.
(2) [1893] A.C. 308.
(3) [1891] A.C. 371.

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"employed. The relation of stevedore to shipowner is "a well-known relation, involving no doubt the right "of the master of the vessel to control the order in "which the cargo should be discharged, and various "other incidents of the discharge, but in no way "putting the servants of the stevedore so completely "under the control and at the disposition of the master "as to make them the servants of the shipowner, who "neither pays them, nor selects them, nor could "discharge them, nor stands in any other relation to "them than this, that they are the servants of a "contractor employed on behalf of the ship to do a "particular work."

So in the present case Davison, in my opinoin, stood in no other relation to Holmes, Mullin & Dunn, Ltd., than this, that he was the servant of a contractor—the Board—who were employed by Holmes, Mullin & Dunn, Ltd., to do this particular work of transport and delivery of petrol for reward. To apply the test of Bowen, L.J., in *Moore v. Palmer* (1), Davison was not transferred to them for the purpose of unloading or delivery—all that was transferred was the use and benefit of his work.

I shall deal much more briefly with the remaining questions, upon which Brown, J.—in my opinion quite rightly—affirmed the findings of the arbitrator. The first of these questions is whether the act of Davison in lighting a cigarette and throwing the match on the floor of the garage amounted in the circumstances to negligence within the course of his employment as such servant, for the consequences of which his master was responsible. This question is answered to my complete satisfaction by the case of *Jefferson v. Derbyshire Farmers, Ltd.* (2). I confess that I have difficulty in appreciating some of the niceties of distinction sought to be drawn by the learned Lords Justice between that case and *Williams v. Jones* (3). No doubt the petrol in *Jefferson's case* (2) was a more dangerous substance than were the shavings in *Williams v. Jones* (3), but this was only a difference in degree.

(1) 2 T.L.R. 781.
(2) [1921] 2 K.B. 281.
(3) 3 H. & C. 256, 602.

I do not understand why the carpenter lighting a shaving and letting it fall on the floor where it ignited other shavings was held to be doing an act unconnected with the work he was employed to do whilst the boy who threw the match on the garage floor where it ignited petrol was regarded as doing an act which was in itself a negligent performance of the work he was employed to do. Yet such is the view expressed by Bankes, L.J., at p. 286. For my own part I do not hesitate to say that I prefer the dissenting judgment of Mellor and Blackburn, JJ., in *Williams v. Jones* (1) to the judgment of the majority of the Court which was delivered by Keating, J. In these days we can scarcely compare the striking of matches for smoking purposes and throwing them on the floor with the "act of firing off squibs" at intervals during a man's work. Yet such was the view expressed by Keating, J. But, however this may be, I find *Jefferson's case* (2) indistinguishable in principle from the present case. Like Bankes, L.J., I do not propose to determine whether smoking can be said to be within the scope of a servant's employment or whether in this case Davison was authorised by his employers to smoke. The true ground of the Board's liability does not rest upon an answer to such a question, but rather that it was within the scope of Davison's employment to empty the petrol out of the tanker into the storage tank, and that it was his duty to do that work with all due and proper care so as to prevent injury or damage being occasioned to others. To smoke and throw a lighted match on the floor in the garage was not to perform the work with that due or proper care which the inflammable nature of the petrol demanded. Davison was, in fact, acting in direct violation of statutory regulation. The operation upon which he was being employed involved risk of danger from fire unless precautions were taken. The greater the risk, the greater the necessity for precautions, and the higher the degree of caution which was required. Proper and adequate precautions were not taken. On the contrary, whilst the petrol was

(1) 3 H. & C. 256, 602. (2) [1921] 2 K.B. 281.

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flowing into the tank and the work of his employers was therefore being performed in pursuance of the terms of his contract of employment, Davison, by lighting and throwing away the match, performed that work in a manner which in the circumstances was both improper and grossly negligent.

The last question formulated by the parties as set out in the Case Stated is whether the damage to the property of the third parties was in the circumstances caused by the use of the tanker (including the loading and/or unloading of such vehicle) within the meaning of section ii, clause 1, of the policy. This clause provides (*inter alia*) that the Company would indemnify the Insured against liability at law for compensation in respect of damage to property caused by the use of any such vehicle (including the loading and/or unloading of such vehicle.) To this clause is attached a proviso to the effect that the Company should not be liable in respect of damage caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to such vehicle for loading thereon or the taking away of the load from such vehicle after unloading therefrom.

Serjeant Sullivan's first point was that the damage was not caused by the "use" of the vehicle because it was admittedly stationary at the time. It had, he contended, ceased to be "a vehicle" and become "a store," and it was only as a vehicle that it was insured. Even if there were nothing to guide me to a contrary conclusion, I should, indeed, be very slow to hold that a tanker still containing petrol for delivery pursuant to contract had ceased to be "a vehicle" or had ceased to be "in use" merely because the delivery station had been reached and the tanker's wheels had temporarily ceased to revolve. The words of the clause are "by the use of" not "by the driving of" the vehicle. But we are not left to speculate upon this matter, for the bracketed words—"including the "loading and/or unloading of such vehicle"—make it perfectly clear that the tanker is still in "use" whilst these operations are proceeding during which it is necessarily completely at rest. The learned Serjeant's

argument that the petrol must be considered as being delivered drop by drop and that each drop was in fact completely delivered as soon as it left the body of the vehicle and entered the delivery pipe does not commend itself to my acceptance. The unloading of the petrol and the throwing down of the lighted match were cotemporaneous acts.

The learned Serjeant's second point, which rested upon the proviso, was that the damage was caused or arose beyond the limits of the carriageway or thoroughfare. This, however, is not sufficient to give exemption under the proviso. The damage must have been caused or have arisen in connection with . . . the taking away of the load from such vehicle after unloading therefrom. These words of a printed form of policy would probably be more appropriate to other classes of goods than petrol; but at least it can be said that the condition was not complied with in the present case as the fire occurred during, not after, the unloading of the petrol.

For these reasons I am of opinion that we should answer the question submitted to us in paragraph 18 of the Case Stated in the affirmative—that the Company was and is liable to pay the sums in the Case Stated mentioned. The Board must have their costs, both in this Court and also before Brown, J.

Babington, L.J.: I agree.

Though the facts in this case are few, the arguments occupied a considerable time and would undoubtedly have been more prolonged if we had acceded to the contention that the transcript of the evidence should be read.

It comes before us by way of Case Stated on a question of law under section 22 of the Arbitration Act (Northern Ireland), 1937, and must be decided as a matter of law upon the findings of the arbitrator, who is the sole judge of the facts and cannot remit the case to this Court as an open question to be decided on the facts as well as the law.

The arbitrator has found the facts orally deposed to in paragraph 9 of the Case upon which in his view

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liability depends. If other facts were deposed to in evidence I can only assume either that they are immaterial or that the arbitrator did not accept them, and if either party wished to have the case added to or amended they should have gone back to the arbitrator and made this request to him.

No doubt the Arbitrator has set out the transcript of the evidence as appended to and to form part of the case. I do not know why he did so, but this does not make it receivable in this Court, and in my opinion it was properly rejected.

The Lord Chief Justice has summarised the facts upon which liability turns and I will not repeat them.

At the conclusion of the arguments before the Arbitrator he was asked to state his award in the form of a special case, and having acceded to this request, counsel for the parties formulated their questions, the answers to which would determine liability.

As to the first question, I think the Arbitrator has drawn the correct inference from the facts.

The contract between the Irish Road Transport Company, Ltd. (now represented by the applicants, the Northern Ireland Road Transport Board) was to deliver petroleum spirit for Holmes, Mullin & Dunn, Ltd., throughout Northern Ireland. To deliver they had to carry and their charges or freight were calculated at so much per gallon carried. On the day of this accident Davison, who was in the general employment of the Board, having taken on board a consignment of petrol at the Larne Depot of Holmes, Mullin & Dunn, Ltd., drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hose into the man-hole of Catherwood's tank, turned on the stop-cock at the side of the tanker, and the petrol then began to flow into the tank.

Apart from any agreement to the contrary all this was part of his duty to carry and deliver the petrol on behalf of his employers. But the Insurance Company rely on the Transport Agreement under which this delivery was effected as showing that in fact Davison was in the employment of Holmes, Mullin & Dunn, Ltd., as soon as the tanker came to rest in the garage and the process of discharging its load began.

The answer to this depends upon the construction to be placed upon clause 9 of the agreement, for unless this clause makes the driver the servant of Holmes, Mullin & Dunn, Ltd., as claimed by the Insurance Company, I can find nothing in the agreement which could have this effect.

Clause 9 reads as follows :—

> "All the employees of the said Irish Road "Transport Company, Limited, engaged in or "about the said delivery shall accept and obey "the orders of the said Holmes, Mullin & Dunn, "Ltd., or their representatives regarding such "delivery, the payment of accounts, and all "matters incidental thereto, and the said Irish "Road Transport Company, Limited, shall dismiss "any employee of theirs disregarding or failing "to obey such orders.
>
> "Provided always that the said Irish Road "Transport Company, Limited, shall indemnify "the said Holmes, Mullin & Dunn, Ltd., against "all claims, actions and demands arising out of "or on account of such dismissal, and Provided "that nothing herein contained shall be taken as "meaning or implying that such employees of "the said Irish Road Transport Company, "Limited, are in any way the employees of the "said Holmes, Mullin & Dunn, Ltd."

It was contended that this clause made Davison the servant of Holmes, Mullin & Dunn, Ltd., when the tanker came to rest in the garage because delivery began then and he was bound to obey their orders in and about the delivery.

A number of cases were cited and in particular *Donovan v. Laing, Wharton and Down Construction Syndicate* (1), *McCartan v. The Belfast Harbour Commissioners* (2), and *Bain v. Central Vermont Railway Co.* (3), a case which Serjeant Sullivan maintained is a conclusive authority on the facts of this case that while discharging his load Gardiner Davison was the servant of Holmes, Mullin & Dunn, Ltd., and not the servant of the Transport Board.

(1) [1893] 1 Q.B. 629.
(2) [1911] 2 I.R. 143.
(3) [1921] 2 A.C. 412.

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In *Donovan v. Laing* (1), the defendants lent a crane with a man in charge and it was held on the facts that the man was also lent and became subject to the control of the borrowers, and as Bowen, L.J., says in *Moore v. Palmer* (2), "The great test was this, whether "the servant was transferred or only the use and "benefit of his work." *McCartan v. Belfast Harbour Commissioners* (3), also a crane case, was decided the other way, again on its own facts. The net issue is stated by Lord Dunedin at p. 149: "Had the hirer "authority to control Duffy otherwise than in respect "of the time and place of movement of the crane and "the time of raising and lowering the buckets?" and the answer was "No."

The rule to be applied is clear as Lord Dunedin says in *McCartan's case* (3) at p. 149: "There is no principle "involved in *Donovan's case* (1), or in this case, except "the principle which I have already mentioned, which "is compendiously described by the brocard *respondeat* "*superior*, and as to which no one entertains any doubt. "The application of that principle to each particular "case depends upon facts, and is a question of fact, "and the facts of one case can never rule another, "and are only useful so far as similarity of facts (for "identity, the word so often used, is really a con-"venient misnomer) are a help and guide to decision."

Lord Dunedin also delivered the judgment of the Privy Council in *Bain v. Central Vermont Railway Co.* (4). In that case the accident happened while the respondents' engine driver was driving his engine on the line of another company under a joint working agreement between the two companies, and it was held that as at the time of the accident he was controlled by the signals of the company on whose line he was running, he was under their control. Lord Dunedin says at p. 416: "Now what caused the accident? "The disregard of the signals. They were Grand "Trunk signals. These signals were the mechanical "expression of the orders of the Grand Trunk, orders "which Frost at that moment was bound to obey."

(1) [1893] 1 Q.B. 629.
(2) 2 T.L.R. 781.
(3) [1911] 2 I.R. 143.
(4) [1921] 2 A.C. 412.

In applying to the present case the principles as to which, in the words of Lord Dunedin, no one entertains any doubt, these decisions are useful as a guide but no case falls precisely within another, and the facts here must be independently examined to ascertain, if possible, who was entitled to control the servant in the operation out of which the damage arose.

As I have said, Gardiner Davison was in the general employment of the Board. They employed him and paid him and they alone could dismiss him. His duty on the day of the accident was to take a load of petrol into the tanker at the depot of Messrs. Holmes, Mullin & Dunn, Ltd., in Larne, carry it to Catherwood's garage in Belfast, and there deliver it into Catherwood's tank, and, until this series of operations was completed, the petrol was not delivered and, unless the agreement effects a change in their relationship, Davison was throughout the servant of the Board.

But it is claimed that the agreement altered this relationship and transferred Davison from the employment of the Board to that of Holmes, Mullin & Dunn, Ltd., as from the moment that the tanker came to rest in the garage.

This depends on the construction to be put on the agreement. It is an agreement of a transport company to deliver petrol, &c., for "freight" and delivery of course entails carriage, and I can find nothing in the agreement to suggest that Davison became the servant of Holmes, Mullin & Dunn, Ltd., at any stage of the carriage and delivery unless clause 9 has this effect. Brown, J., interpreted the clause as giving Holmes, Mullin & Dunn, Ltd., complete control of the delivery. He says: "They alone could say where the petrol was "to be delivered, when it was to be delivered, and "how it was to be delivered, into what containers it "was to be put, whether slowly or at speed, and in "my view Messrs. Holmes, Mullin & Dunn, Ltd., or "their representatives, had the right to control the "doing of the act."

This is not, in my opinion, the proper construction of this agreement. The right to give orders to the servants of the Board which this clause reserves to

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Holmes, Mullin & Dunn, Ltd., are those rights "regarding such delivery" as are appropriate and necessary for them to give as consignors and would include directions as to the quantities in which, the time when, and the customers to whom petrol was to be delivered. They could, as Bowen, L.J., says in *Donovan v. Laing* (1), prescribe the end, the means of arriving at it being left to the Board. The fact that to this right to give orders regarding the delivery there is annexed the right to give orders regarding the payment of accounts suggests that the parties were not contemplating something connected with the physical act of delivery, but an entirely different range of matters connected with the sales by Messrs. Holmes, Mullin & Dunn, Ltd., to their customers and their completion by delivery. The words "all matters "incidental thereto" which follow the words "delivery" and "payment of accounts" cannot extend the meaning of the prior words, for if "all "matters incidental" to the delivery cover any part of the physical act of delivery it must cover it all for it was one continuous act from the time the petrol was taken on board until it was discharged into the customer's tank, and on the facts in this case is incapable of being divided into a series of separate acts, for some of which the Board were responsible and Holmes, Mullin & Dunn, Ltd., for the remainder.

If the proviso at the end of clause 9 came anywhere else in the agreement I would not attach much importance to it, as it might refer to employment generally, but coming as it does at the end of this clause it shows that the parties were attempting to put their own construction on the preceding provisions by limiting them to such acts as might be done in pursuance of orders given by the consignor, and if this be so the limitation of the prior words gives effect both to them and the proviso and reconciles the suggested contradiction between them.

It is also of importance to notice that at the times of actual delivery the representatives of Holmes, Mullin & Dunn, Ltd., would not in all probability be present

(1) [1893] 1 Q.B. 629.

to give orders regarding the delivery, and it is not to be lightly assumed that the parties to the agreement were providing in clause 9 for something which in the ordinary course of business would seldom, if ever, occur. Holmes, Mullin & Dunn, Ltd., in fact exercised no control over the physical delivery of this consignment of petrol, and in my opinion there is nothing in the agreement which would have enabled them to do so.

It is impossible to enumerate the matters in respect of which a consignee to whom delivery is being made or the consignor or his representative may give directions without assuming responsibility for the servant of the carrier. Whatever the consignee can do I think the consignor can do on his behalf if he be not both consignor and carrier.

An every-day example will suggest some of these directions. A case of wine is consigned by rail and when the customer has been notified that it has arrived he can surely say where it is to be delivered, when it is to be delivered and how it is to be delivered without making himself the employer of the railway servant who brings it to his house. Or these directions might be in writing on a label attached to the case—" Wine, " for delivery to A.B. To be set down gently and " delivered without delay."—and accepting the learned Judge's summary of the acts which he says Holmes, Mullin & Dunn, Ltd., were entitled to control by virtue of clause 9, I cannot see that they go beyond this or that they amount to anything more than directions as to the place, time, method and manner of the delivery, the control of the act itself remaining with the Transport Board.

Gardiner Davison at the time of the accident was therefore the servant of the Board.

The next question is whether the act of Davison in lighting a cigarette and throwing the match on the floor of the garage was negligence within the course of his employment.

It has been argued that this was an independent act by Davison unconnected with his employment, and *Williams v. Jones* (1) was cited in support of this proposition.

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In that case a carpenter employed by the defendant, while making a sign-board, lighted his pipe from a match with a shaving, dropped the shaving thereby setting fire to the shed. The Exchequer Chamber affirming the Court of Exchequer, held that the carpenter was an independent wrongdoer.

Williams v. Jones (1) was distinguished in *Jefferson v. Derbyshire Farmers, Ltd.* (2), where the facts were almost identical with those in the present case. There a youth employed by the defendants in a garage, while drawing motor spirit from a drum into a tin, struck a match, lit a cigarette, and then threw the match on the floor, as a result of which act the garage and its contents were consumed.

An attempt was made to distinguish these two cases by saying that in *Jefferson v. Derbyshire Farmers, Ltd.* (2), the boy brought the petrol to the flames, while in *Williams v. Jones* (1), the man brought the fire to the shavings, and it was argued that the present case is governed by *Jefferson v. Derbyshire Farmers, Ltd.* (2), because here Davison brought the fire to the petrol.

This is an ingenious argument but nevertheless I am satisfied that *Jefferson v. Derbyshire Farmers, Ltd.* (2), governs this case if it is good law, though whether the grounds on which *Williams v. Jones* (1) was there distinguished are sound I am not prepared to say. It is sufficient for the decision of the present case that, even if it be impossible to distinguish these two cases on their facts, which I believe to be the true view, I prefer the reasons given in *Jefferson v. Derbyshire Farmers, Ltd.* (2), and am prepared to follow it.

In that case the boy was drawing benzol and at the same time lighting a cigarette, and the Court of Appeal held that in these circumstances he was doing the act (i.e., drawing the benzol) negligently.

Here Davison was emptying his employers' tanker of a load of petrol and while doing so he lit a cigarette and threw away the match, and I cannot see how this undoubted act of negligence can be said to be an independent act unconnected with his employment,

(1) 3 H. & C. 256, 602. (2) [1921] 2 K.B. 281.

apart altogether from authority. The act was done when he was engaged on his master's duty in an operation as to which he was bound to exercise extreme care, and when (probably in a moment of forgetfulness) he struck the match he was certainly most negligent, not in lighting the match but in doing so while discharging his tanker, contrary to the regulations which he must be presumed to have been aware of. The personal act and the act done in his employer's interest cannot be separated, and the second question should be answered in the affirmative. I may add that the principle laid down in *Jefferson v. Derbyshire Farmers, Ltd.* (1) was also applied by Palles, C.B., in *Gracey v. Belfast Tramway Co.* (2), and the passage at the foot of p. 324 is very much in point in this case.

The third question arises upon the Policy of Insurance issued by the Century Insurance Company, Ltd. Was the damage to the property of the said third parties in the circumstances covered by the use of the said tanker (including the loading and unloading of such vehicle) within the meaning of section ii, clause 1, of the Policy ?

I omit the " and/or " which disfigures this clause to show that I consider its language sufficiently intelligible without it.

The clause reads as follows :—

> " The Company will indemnify the Insured
> " against liability at law for compensation and
> " claimants' costs and expenses in respect of—
>
> > " Damage to property caused by the use of
> > " any such vehicle (including the loading and/or
> > " unloading of such vehicle."

I have some difficulty in understanding how it can be said that this accident did not arise out of the use of the vehicle. The furthest it could be put was that the unloading was complete when the petrol left the tanker and arrived in the hose connecting the tanker with the tank in the garage—but this is too fine a distinction and I will not pursue it further than to say that in my opinion the operation of unloading is not completed until the load is discharged into the garage

(1) [1921] 2 K.B. 281. (2) [1901] 2 I.R. 322.

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tank, and this time had not arrived, when the accident occurred.

This question should also be answered in the affirmative.

In the result the findings of the Arbitrator should stand on all three points.

Serjeant Sullivan for the Insurance Company raised two other points.

The first was that under the proviso to section ii (1) of the policy, paragraph (*a*), the Company is not liable as the damage was caused or arose beyond the limits of the carriage way or thoroughfare. This point was not taken in the questions submitted by the parties to the Arbitrator and I agree that it has no substance.

A question of subrogation was also raised by the respondents; it was not developed seriously and I need not refer to it further. The respondents must stand or fall by the questions submitted in the case for which they are responsible through their advisers.

Murphy, L.J.

Murphy, L.J.: I agree.

I wish to express my appreciation of the assistance which I have derived from the arguments of counsel on both sides.

For convenience I shall refer to the Northern Ireland Road Transport Board as "the Board," to the Century Insurance Company Limited as "the Insurers," and to Holmes, Mullin & Dunn, Limited, as "the Company."

The learned Arbitrator in the Case Stated, and particularly in paragraph 9 of the case, has set out, clearly, the facts found by him, and, in arriving at a decision on the three questions which were formulated by the parties to the arbitration (namely, the Board and the Insurers) as representing the matters in difference between them, it is our duty to draw the proper inferences from the facts so found and to construe the Agreement dated 11th October, 1939, between the Company and the Irish Road Transport Company, Limited—the predecessors of the Board—(to which I shall refer as "the Agreement") and the Policy of Insurance No. H.M. 622686 issued by the insurers in favour of the aforesaid Irish Road Transport

Company, Limited, to which I shall refer as "the "Policy."

The first question depends on the construction of the Agreement which, under the provisions of section 5 (3) of the Road and Railway Transport Act (Northern Ireland), 1935, became binding on the Board.

I agree with the general submission of Mr. Whitaker and Mr. Fox that this Agreement constituted a contract, *not* to supply tankers and men to the Company so as to enable them (the Company) to deliver their petrol, but a contract under which the Board was bound to deliver the Company's petrol in the Board's tankers operated by the Board's men.

The Board under the Agreement were carriers of the Company's petrol. Clauses (1) and (2) indicate clearly the general character of the Agreement; the words in clause 4: "Given to them for delivery" and in clause 12: "Entrusted to them for delivery," and the provisions as to insurance in clause 5 (provisions which are based on the assumption that the Board were carriers of the petrol) all support this view. Although the word "delivery" (or "deliveries") occurs 20 times in the Agreement, it is only in clause 4 that the phrase "delivery by the said Holmes, Mullin "& Dunn, Ltd.," or any similar phrase occurs, and, save as used in this phrase and in the phrase "un- "reasonably late delivery" in clause 12, the word "delivery" throughout the Agreement means, I think, "*carriage* and delivery," and under the Agreement the Board were bound to carry and deliver the Company's petrol. The Board were therefore delivering the Company's petrol to the Company's customers, and the reason for the use of the words referred to in clause 4 is fairly clear, delay in delivery being a matter which would lead to complaints by the Company's customers against the Company.

Was Davison while engaged in the actual delivery of the petrol into Catherwood's tank the servant of the Board or of the Company?

Serjeant Sullivan, in support of his argument that Davison was, during this operation, the servant of the Company, naturally stressed the words of clause 9,

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and argued that the power to control Davison was at the material time in the Company and not in the Board. While recognizing that his argument derives assistance from the wording of clause 9 (apart from the proviso to that clause), I do not think that it is correct. When Davison called at the depot of the Company at Larne in the morning he would, doubtless, receive his orders for the day from the Company. He would be told (*e.g.*) the number of gallons to be loaded into his tanker, the places at which petrol was to be delivered and the quantities to be delivered at the various places. It is also clear (from the wording of clause 9) that the Company might order Davison not to deliver petrol to some particular customer unless that customer discharged the amount of his outstanding account and paid cash for the fresh delivery.

Such orders, having regard to the enumeration of the places at which petrol was to be delivered to customers might, of necessity, involve directions as to the route to be followed, but I do not think that the general control of Davison would be involved. It is conceded by Serjeant Sullivan that, *qua* the driving and management of the tanker, Davison would remain the servant of the Board, but he argued that when engaged in the actual delivery (in the strict sense of that word) he was the servant of the Company. I do not agree. The actual process by which the stop-cock was opened is not described in paragraph 9 of the Case Stated, but such a stop-cock must have been an essential part of the mechanical equipment of the tanker and while operating the stop-cock it appears to me that Davison clearly continued to be the servant of the Board. While the petrol was flowing through the stop-cock into the delivery hose and so into Catherwood's tank, the duty of Davison would be to watch and regulate this flow by operating the stop-cock, and if through his carelessness the petrol overflowed and was wasted it seems to me that the Board would be liable to the Company for such waste even though this did not constitute "spillage by accident" within clause 5 of the Agreement, while, again, if by such overflowing Catherwood or some other person

suffered damage, a claim for such damage would lie against the Board. It would be remarkable if Davison was the servant of the Company while the petrol was flowing from the tanker into Catherwood's tank, but that if during the process it became necessary for him to start up the engine of the tanker for the purpose of altering the position of the tanker, Davison would again become the servant of the Board. No doubt in effecting a delivery Davison would be "looking "after the interests of the Company," but this could be said of every carrier who delivers a trader's goods to a customer. While wide powers were given to the Company "in or about the said delivery" under clause 9 of the Agreement, I think that the mode and manner of effecting deliveries was still the province of the Board and their servants.

It is also important to observe, as pointed out by Mr. Fox, that the office of the Irish Road Transport Company was in Portadown, while the tankers of that Company which were engaged in the carriage and delivery of the Company's petrol were garaged in Larne where the depot of the Company was, and it was therefore in the interests of both parties to the Agreement that orders should be given direct in Larne by the Company to the men who drove the tankers rather than through the medium of a communication sent from Larne to Portadown and back from Portadown to Larne.

It is also of importance to notice that if the orders given by the Company to Davison were disregarded by him he could only be dismissed by the Board (under clause 9)—see *Reedie v. L. N. W. Railway Co.* (1), while the last proviso to clause 9 makes it clear that whatever may be the legal effect of the earlier part of that clause or any other clause in the Agreement, the two parties to the Agreement intended that Davison should *not* be the servant of the Company—see *Waldock v. Winfield* (2).

I do not agree with Brown, J., that clause 9 of the Agreement gave to the Company "complete control "of the delivery" and that "they alone could say

(1) 4 Ex. 244. (2) [1901] 2 K.B. 596.

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" . . . how it was to be delivered . . . whether slowly " or at speed."

In my opinion the learned Arbitrator was correct in deciding that the first question should be answered, " He (Davison) was the servant of the Board."

As to Question 2, the present case appears to me to be indistinguishable from that of *Jefferson v. Derbyshire Farmers, Ltd.* (1), but Serjeant Sullivan argued that the case is ruled in favour of the insurers by the decision of the Exchequer Chamber in *Williams v. Jones* (2), and that the authority of the earlier case has not been affected by the later decision of the Court of Appeal.

Mr. Whitaker argued that *Jefferson v. Derbyshire Farmers, Ltd.* (1) was decided by the Court of Appeal in favour of the plaintiff because the employee of the defendants (who (as here) lighted a cigarette and threw the match on the floor when he was filling a two gallon tin from a 50 gallon drum of benzol) was engaged in performing a dangerous work, and was negligent in this performance, and distinguished *Williams v. Jones* (2) because the work in that case was not of a dangerous character. I think that this would appear to be the *ratio decidendi* in the judgments of Warrington, L.J., and Atkin, L.J. Serjeant Sullivan on the other hand argued that the true distinction between the two cases is that in *Williams v. Jones* (2) the employee " brought the flame to the shavings and that he was " not in any employment which from any aspect " would bring a flame among shavings " while in *Jefferson's case* (1) the employee " acted in the course " of his employment and, doing an act for which he " was employed, brought the petrol to the flame." I do not agree that Serjeant Sullivan's ingenious explanation can be discovered in the judgments, and I find it very difficult to distinguish the two cases. However, *Jefferson's case* (1) is the later authority, and having regard to the inclination of the average man at the present time to light and smoke cigarettes in as great numbers as he can afford and to throw matches away with complete disregard of the conse-

(1) [1921] 2 K.B. 281. (2) 3 H. & C. 602.

quences, I am of opinion that, while neither case is binding on us, *Jefferson's case* (1) should now be followed in preference to the earlier case.

In *McCartan v. Belfast Harbour Commissioners* (2), at p. 494, Holmes, L.J., said : " It is true that although " we are not technically bound by decisions in the " co-ordinate English Court, we have been in the " habit, in adjudicating on questions as to which the " law of the two countries is identical, to follow them. " We hold that uniformity of decision is so desirable " that it is better, even when we think the matter " doubtful, to accept the authority of the English " Court, and leave error, if there be error, to be " corrected by the tribunal whose judgment is final " on both sides of the Channel."

I, respectfully, agree that this principle should be followed, and as the decisions of the Exchequer Chamber and the Court of Appeal in England seem to be in conflict on facts which most closely resemble the facts of the present case, I shall follow *Jefferson's case* (1), and accordingly answer question " *b* " in the affirmative.

In considering question " *c*," I read section ii (1) of the Policy, omitting unessential words, as " The " Company will indemnify the Insured against liability " at law . . . in respect of . . . damage to property " caused by . . . the unloading of such vehicle." The fact that the vehicle was in a " static " condition does not appear to me to affect the legal position, despite Serjeant Sullivan's argument : obviously unloading would (normally) only take place when a petrol tanker *was* " static."

Whether the delivery hose was attached to and therefore covered by the Policy as an " accessory " of the petrol tanker does not appear from the findings of fact in paragraph 9 of the Case Stated, but I do not consider this of importance because (as was surely to be expected in a policy of insurance on an oil tanker) " unloading " is expressly mentioned as included in the term " use " of the vehicle.

Here the damage was caused because during the unloading of the tanker, its driver, carelessly and

(1) [1921] 2 K.B. 281. (2) [1910] 2 I.R. 470, 494.

C.A. 1940.

IN THE MATTER OF AN ARBITRATION BETWEEN THE NORTHERN IRELAND ROAD TRANSPORT BOARD AND THE CENTURY INSURANCE COMPANY, LIMITED.

MURPHY, L.J.

contrary to the Regulations, proceeded to light a cigarette and throw away the match. It appears to me that the damage was caused by the negligence of Davison in the unloading of this vehicle. Having opened the stop-cock it was clearly his duty to watch the flow of petrol, to regulate it, if necessary, and to close the stop-cock when the necessary quantity had been transferred to the tank. To throw away a match as he did under the circumstances was an act of what might be, popularly, described as "gross negligence," and although the match ignited some waste, this waste must have been close to the tank which was being filled, for the learned Arbitrator finds: "The match "ignited some material on the floor of the garage and "a fire was caused *forthwith* where the nozzle of the "delivery hose was discharging into the tank."

When the Policy by section ii (1) indemnifies the Insured against "liability at law . . . in respect of ". . . damage to property caused by the . . . "unloading of such vehicle," this must be based on the assumption that there might be some negligence or other wrongful act in the unloading, for if the unloading was carefully and properly carried out no liability at law could arise. I therefore think that in the present case section ii (1) of the Policy (which, if it were necessary to remove am ambiguity, should be construed *contra proferentes*, i.e., the Insurers) must be construed as if it read "liability at law . . . in "respect of damage to property caused by the . . . "negligent unloading of such vehicle." If so read, this section of the Policy does provide, in my opinion, an indemnity for the Board in the circumstances of the present case. I recognize the apparent distinction in this section between the words "caused by" and "caused by or arising out of" and "caused or "arising"; but it should be noticed that the words "caused by or arising out of" are those used in section 7 (1) (*b*) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24), which prescribes the requirements in respect of policies, if such policies are to comply with the provisions of the Act as to compulsory insurance against third party

risks by the users of motor cars, while the proviso " a " to section ii (1) of the Policy is clearly referable not to petrol tankers but to commercial motor vehicles used for the carriage of goods and is a clause which, as applied to a petrol tanker, is meaningless. I therefore am of opinion that here the damage was caused by the negligent unloading of this petrol tanker within section ii (i) of the Policy.

In *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1), Lord Finlay, at p. 355, expresses the view that *causa proxima* in Insurance law is equivalent to what is " in substance " the cause, and Lord Dunedin, at p. 362, considers that such cause is to be determined by common sense principles, see Lord Wright in *Canada Rice Mills, Ltd., v. Union Marine, etc., Co.* (2), at p. 329.

My comment on the proviso " *a* " is a sufficient answer to Serjeant Sullivan's argument based on this proviso, and a further answer is that the damage here was not caused by and did not arise in connection with " the taking away of the load from such vehicle *after* " *unloading therefrom.*" That each drop of petrol as it passed through the stop-cock into the delivery hose had been " unloaded " from the lorry appears to me to attach an almost fantastic meaning to a proviso which, as I have said, was never intended to apply to a petrol tanker.

I am therefore of opinion that Question " *c* " should be also answered in the affirmative, and that the two sums of £1,001 16*s.* 7*d.* and £350 are accordingly due and payable by the Insurers to the Board.

Solicitors for the Northern Ireland Road Transport Board : *J. C. W. Rea & Son.*

Solicitors for the Century Insurance Company, Ltd. : *George L. MacLaine & Co.*

J. McC.

(1) [1918] A.C. 350.
(2) [1940] W.N. 328, 329.

K.B.D. 1940.

R. J. ALLAM LIMITED v. KAYES.

Nov. 29. Dec. 13.

Practice—Debtors Act (Ireland), 1872—Committal Order—Order XLIV, Rule 4—Instalment in arrear—Costs of committal order.

The Court when making an order for committal to prison under the Debtors Act (Ireland), 1872 (35 & 36 Vict., c. 57), sec. 6, may make the payment of the creditor's costs of the application to commit a condition precedent to the debtor's discharge.

APPLICATION on behalf of the plaintiff for an order that the defendant be committed to prison for six weeks for non-payment of one of the instalments of £8 by which the Court had ordered the defendant to pay the amount for which the plaintiffs had marked judgment.

Agnew for the plaintiff :—

The plaintiffs are entitled to an order making the payment of their costs of this application, as well as the instalment of £8, a condition precedent to the defendant's discharge.

There was no appearance for the defendant.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is an application by the plaintiffs for a committal order against the defendant by reason of his default in paying the sum of £8 ordered to be paid by him by an order of this Court dated 21st June, 1940.

The plaintiff's judgment debt is the substantial sum of £481 3*s.* 6*d.* which together with the costs of the application I directed by the said order should be paid by an instalment of £8 on or before 24th July, 1940, with like instalments of £8 on or before 24th of each succeeding month until fully paid. At the time when I made such order I was satisfied as to the defendant's ability to pay such instalments ; and in the affidavit grounding this application it is sworn, and it is not contradicted, that there has been no change in the

circumstances of the defendant since the date of the said order.

It further appears in the said affidavit that the defendant defaulted in payment of the first, second and third instalments ordered to be paid on 24th July, 24th August, and 24th September respectively, and the plaintiffs were compelled to obtain committal orders in respect thereof. By the said orders the defendant's discharge from custody was dependent upon his paying the said several instalments, the payment of the costs of the order being in no way made a condition of such discharge. On each occasion the defendant paid such instalment to the Under Sheriff but not the costs of the several committal orders. The present application relates to the fourth instalment payable on 24th October last.

The plaintiffs are clearly entitled to a committal order, but I have been asked to modify the form of the order on the present occasion and to make the defendant's discharge conditional not only on payment of the instalments but also of the costs of obtaining the order. There is no doubt that this is a proper case in which to make such an order if there is jurisdiction to do so.

By section 6 (2) of the Debtors Act (Ireland), 1872, it is (amongst other things) provided that the person imprisoned under the section shall be discharged out of custody upon a certificate to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned together with the prescribed costs (if any). By section 10 "prescribed" means as respects the superior courts of common law, prescribed by general rules to be made in pursuance of the Common Law Procedure Act, 1853. Order 44, r. 4, of the Rules of the Supreme Court provides that the Court or a Judge in making an order for committal under the 6th section of the Debtors Act may order the debt to be paid, as in the present case, by instalments and make the imprisonment determinable on payment of such costs and such of said instalments as the Court or Judge shall think fit. Rule 7 of the same order, which prescribes the form of a certificate

K.B.D. 1940.

R. J. ALLAM LIMITED v. KAYES.

ANDREWS, L.C.J.

of payment, also recognises the right to include the payment of costs as a condition to the granting of a certificate.

In my opinion the statute and Rules to which I have referred justify me in making the order as sought, and I am confirmed in this view by the case of *McTaggart v. Howard* (1). It is no doubt true that in that case the Court of Appeal only made the payment of the instalment and costs of the instalment order a condition of the defendant's release, but the reasoning of the judgments in my opinion applies with equal force to the payment of the costs of the committal order. Such costs are in my opinion as much "prescribed costs" as are the costs of an instalment order; and under section 6 of the Act and the Rules of Court referred to it is purely a matter for the discretion of the court in each case as to what are the reasonable and proper terms to impose in respect of the payment of costs as a condition of the defendant's release. In my opinion the order which I make in the present case is justified both in law and on the merits; and I trust it may prove to be salutary so that future applications of this character in this action may not be found to be necessary.

Solicitors for the plaintiffs: *Shean & Dickson.*

M.W.G.

(1) [1903] 2 I.R. 557.

COLLIER, Applicant ;
DOWN COUNTY COUNCIL, Respondents.

C.A.
1940.

Nov. 23.

1941.

Feb. 6.

Malicious injury—Fence—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sec.* 135.

A fence not connected with any canal or navigation, which has been maliciously injured or destroyed, is not a subject of compensation under the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), sec. 135.

Bell v. County Council of King's County (1910) 2 I.R. 25 followed.

Milligan v. Corporation of Londonderry (1920) 2 I.R. 1 not followed.

Case Stated by Andrews, L.C.J., on the hearing of an appeal against a decision of the County Court Judge of Down, refusing an application for compensation under the Grand Jury (Ireland) Act, 1836, for malicious damage to a fence. The Case Stated submitted the following questions for the decision of the Court of Appeal :—

1. Should the words " or other work " in section 135 of the Grand Jury Act (Ireland), 1836, be read *ejusdem generis* with those which immediately precede them ?
2. If so, is the wire fence in respect of which compensation is claimed a work of such a character ?
3. If not, is the wire fence, a " work " within the section ?
4. Must a " work " to be the proper subject of a claim within the said section be the property of a public or privately owned canal or navigation ?

C. Stewart for the appellant :—

The words " other work " in section 135 of the Grand Jury (Ireland) Act, 1836, are not to be confined to words *ejusdem generis* with those in the preceding part of the section but extend to cases of malicious injury to other works such as the destruction of

C.A. 1940.

COLLIER, Applicant; DOWN COUNTY COUNCIL, Respondents,

fences: *In re Fitzpatrick* (1), in which Perrin, J., said that the section was a remedial enactment, and that he was disposed to construe it liberally. If the *ejusdem generis* rule applies, the *genus* must be work connected with a public canal or navigation; if that *genus* was ever held to exist, such decision was overruled by the Court of Appeal in *Milligan v. Londonderry Corporation* (2); if that *genus* does not exist the words must be construed as we find them, and are not subject to any restrictive interpretation. In *Bell v. King's County County Council* (3), the Court of Appeal merely decided that a fence is not *ejusdem generis* with a gate. The present case is covered by the decision of the Court of Appeal in *Milligan v. Londonderry Corporation* (2). If there is any doubt about the construction of the section, it ought to be construed liberally: *re Fitzpatrick* (1).

[He also referred to *re Collier* (4), *re Revington* (5), *re Athlone Boat Club* (6).

Chambers, K.C., and *Copeland* for the respondents :—

The words "or other work" are *ejusdem generis* with "bank, lock," etc., with which they are coupled, and no compensation is payable in respect of a fence not connected with any canal or navigation. *Bell v. King's County County Council* (3). In *Milligan v. Londonderry Corporation* (2), the Court did not purport to reverse *Bell v. King's County County Council* (3); they distinguished the cases; the claim in *Milligan's case* (2) was in respect of injury to a gate, a subject matter which is expressly mentioned in the section; a fence is not *ejusdem generis* with any of the subject matters there mentioned.

In *In re Athlone Boat Club* (6), the remedial argument was rejected by the Court and the *ejusdem* argument accepted.

(1). Ir Cir. R. 819.
(2) [1920] 2 I.R. 1.
(3) [1910] 2 I.R. 25.
(4) 8 I.L.T.R. 208.
(5) 15 I.L.T.R. 50.
(6) I.R. 11 C.L. 237.

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C. Stewart (in reply):—

In *O'Meara v. County Council of Tipperary* (1), Ronan, L.J., said that the result of the decision in *Milligan's case* (2) is to remove the limitation of the words "bank, gate," etc., in section 135 to works of that nature belonging to any public canal or navigation which has existed since the decision in *Bell v. King's County County Council* (3).

BABINGTON, L.J.

1941. Feb. 6.

BABINGTON, L.J.: This case raises once more the question as to whether malicious damage to a fence is a proper subject matter for compensation under the provisions of section 135 of the Grand Jury (Ireland) Act, 1836, and, as we have been referred to two conflicting decisions of the Irish Court of Appeal upon this section, it will be more convenient to examine the Statute itself before dealing with the authorities.

Section 135 provides that in all cases of maliciously or wantonly setting fire to, burning or destroying certain enumerated classes of property, compensation may be awarded for such injury to be levied off the county or part of the county.

The last class of property in the section comprises "any bank, gate, lock, weir, sluice, bridge, dam, or "other work belonging to any person, public canal or "navigation," and it is argued that "other work "belonging to any person" includes all works without limitation.

To this it is answered that all the items of property enumerated in the last class are governed by the words "belonging to any person, public canal or navigation," and that the word "person" here is not a general word but a particular one introduced into the section to include the owners of private as well as public canals.

The section is awkwardly drafted owing, perhaps, to the way it evolved from prior legislation, and we are entitled to look into its history and the state of the law when it was passed to ascertain if possible what

(1) 54 I.L.T.R. 106.
(2) [1920] 2 I.R.1.
(3) [1910] 2 I.R. 25.

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COLLIER, Applicant; DOWN COUNTY COUNCIL, Respondents.

BABINGTON, L.J.

were the mischiefs or defects not then provided for and what was the intention of Parliament. *Heydon's case* (1).

Before the passing of 3 & 4 Wm. IV., c. 78, in 1833, there were in force in Ireland several statutes under which compensation for malicious damage to property could be awarded, e.g., The Whiteboy Acts and 56 Geo. III., c. 55, a Canal and Navigation Act.

Section 1 of that Statute recited that by 40 Geo. III., c. 55, power was given to the Lord Lieutenant to nominate Five Persons to be directors of all Works relating to Inland Navigation in Ireland, and went on to extend the powers of such directors in respect of all canals and navigations vested in them.

Section 10 provided that when and as often as any bank, gate, lock, sluice, bridge, dam or other work belonging to any canal or navigation in Ireland should be maliciously, wantonly or intentionally damaged, injured or destroyed, it should and might be lawful for the said directors with respect to such canals and navigations respectively as were or might be vested in them, and also for all and any company of undertakers or proprietors of any other canal or inland navigation in Ireland with respect to such canals and navigations respectively as were not or should not be vested in the said directors, to sue for and recover satisfaction and amends for the injury, loss or damage so done as aforesaid at the next Assizes. The Grand Jury were ordered to present such damages to be levied and raised within the county. The words "Public Canal or "Navigation" do not appear in the Statute but such undertakings are distinguished as being either those vested in the directors, which in fact were public undertakings, or those vested in companies of undertakers or proprietors, which were privately owned.

In 1833 new provisions were made for compensation for criminal injuries by 3 & 4 Wm. IV., c. 78, section 10.

The opening words of that section were as follows:— "And be it enacted that in all cases of maliciously and "wantonly burning, demolishing or pulling down any "house, outhouse, haggard or other building or of

(1) 3 Co. Rep. 7a.

"robbery, burning, sinking, destroying or otherwise "injuring of any corn, turf, merchandise, store, boat, "barge, vessel or other property, or of maliciously "houghing, cutting, maiming or injuring of any "cattle," it shall and may be lawful to make a presentment and details of the procedure to be followed were prescribed.

The words "other property" in this section were clearly *ejusdem generis* with the preceding words and the property of canal and navigation undertakings, both public and private, were omitted from the section.

In the *Carlow Presentment Case* (1), the judges by a majority of six to five decided that the section repealed all former laws on the subject of malicious injury to property, and as a result of this decision the rights of the canal and navigation directors and owners under their own Act of 56 Geo. III., c. 55, were taken away, possibly "*per incuriam*," although that section remained on the Statute Book unrepealed by direct legislative enactment until it was disposed of by the Statute Law Revision Act, 1873. This was the state of the law when the Act of 1836 was passed. Section 135 of that Act reproduces the provisions of section 20 of the 3 & 4 Wm. IV., c. 78, re-arranged and with some additions and limitations. The words "other property" are omitted but the words "other building" are added to "house or outhouse," and the words of section 10 of the Canal and Navigation Act with the addition of "weir" are introduced, the inference being to my mind conclusive that they were introduced as a result of the decision in *the Carlow Presentment* (1), and that the words "belonging to any person, public canal or "navigation" were intended as a paraphrase of the more extended description of the two classes of undertaking described in 56 Geo. III., c. 55, section 1. "public "canal or navigation" being those vested in the directors and "any person" being those not so vested.

The operation of these words must therefore be confined to the subject matter they were intended to apply to and cannot be extended generally to all classes of property as if this were a general enactment.

(1) Jebb's C. C. 180.

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If Parliament had intended all works of the nature specified, or all works generally, belonging to "anyone" "everywhere" to be within this section it is difficult to believe that this simple general enactment would have been expressed in the terms found here or that any reference whatever would have been made to canals or navigation. Strictly speaking, this is not a case of general words being read *ejusdem generis* but one in which the general words "other works" are defined in the section when properly construed as being limited to such works as belong to any public canal or navigation or to private owners of any such undertaking, and until this has been established the question does not arise as to whether "other work" is *ejusdem generis* with the enumerated works. To succeed an applicant claiming in respect of damage to a fence must therefore prove that the fence belongs to a public canal or navigation or a private canal or navigation, and if he can establish this he must further prove that a fence is *ejusdem generis* with a bank or gate.

Coming to the authorities: the section was held to apply to fences in *Re Fitzpatrick* (1), a case tried by Perrin, J., on circuit. He says: "The words 'other "'work' might be construed to signify other works "'*ejusdem generis*' with those mentioned in the "preceding part of the section, and so be confined to "waterworks."

This was a presentment case before the Local Government Act, 1898, and no one was heard in opposition to the claim, which came before the Court on appeal from the Grand Jury who had disallowed it, and was allowed to go to a jury, Perrin, J., saying: "It is, "however, a remedial enactment and therefore I am "disposed to construe it liberally." The report is very short and no reasons are given, but it shows that Perrin, J., considered that the first difficulty was as to whether the section was to be confined to works belonging to canals, etc., or to be given a general application, and he does not go on to discuss whether fences are "*ejusdem generis*" with banks or gates.

(1) Ir. Cir. R. 819.

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COLLIER, Applicant; DOWN COUNTY COUNCIL, Respondents.

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In re *The Rev. Mathew Collin, P.P.* (1), the applicant claimed for clerical vestments and church property maliciously destroyed. Dowse, B., did not deal with the general limitation of the words to canals, etc., but held that these articles were not "*ejusdem generis*" with any of the works mentioned in the section, which could scarcely be argued, and this disposed of the case. He is reported to have made a reference to the case of *In re Fitzpatrick* (2), saying that he agreed in the decision but not in Judge Perrin's reasons as reported. Baron Dowse's own reasons are very imperfectly reported but it is clear that he refused to give the words "other work belonging to any person" such a general meaning as would include vestments and church property.

In *The Athlone Boat Club Case* (3), a claim in respect of a rowing boat was reserved by May, C.J., for the Judges, who held that it did not come within the Act. No reasons were given and consequently it does not appear whether the Judges decided that the general words only apply to the property of a canal company, &c., or that a rowing boat is not *ejusdem generis* with banks, gate, etc."

In *Re Revington's Presentment* (4), Dowse, B., again refused an application in respect of the machinery of a steam launch without giving any reasons.

In *Re McCourt's Case* (5) (Murphy, J.), and *Re Gort Club Presentment* (6) (Andrews, J.), are also cases where compensation was refused.

All the circuit decisions are unsatisfactory, not only for the reasons given by Holmes, L.J., in *Bell v. King's County County Council* (7) at p. 28, but because they are obviously very imperfectly reported, and until *Bell's case* (7) came before the Court of Appeal the scope of section 135 was never adequately dealt with. In *Bell's case* also (7) the damaged property was an ordinary wire fence along a road but it was not connected with any canal or navigation. The damage

(1) 8 I.L.T.R. 208.
(2) Ir. Cir. R. 819.
(3) I.R. 11 C.L. 237.
(4) 15 I.L.T.R. 50.
(5) 24 I.L.T.R. 10.
(6) 28 I.L.T.R. 138.
(7) [1910] 2 I.R. 25

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was held not to be the subject of compensation under the Statute, which would dispose of the present case if the decision is binding on this Court.

Strictly speaking, the decisions of the Court of Appeal in Ireland are not binding on us but we follow them as a matter of course unless there are very strong reasons to the contrary and more especially in cases in which the law as declared has been accepted as the law of the land for any considerable time. *Bell v. King's County County Council* (1) has, however, been severely handled in a subsequent case of *Milligan v. The Corporation of Londonderry* (2), and it is necessary to see what it in fact decided.

The Lord Chancellor (Sir Samuel Walker) says—p. 27—that section 135 of 6 & 7 Wm. IV., c. 116, deals with five subject matters, No. (5) being "any bank, "gate, lock, weir, sluice, bridge, dam or other work "belonging to any person, public canal or navigation." "I think that these are all perfectly distinct subject "matters, and that the words '*or other work*' are "*ejusdem generis* with the particular subject matter "with which they are coupled, *namely, the fifth of* "*those to which I have referred.*" And at p. 28: "We "cannot hold that the malicious damage to the fence "here in question comes within the purview of the "section." The Lord Chancellor treats all the items enumerated in his fifth subject matter as one, and since they can only be one if they are joined together as a class by the words "belonging to any person, "public canal or navigation," he in effect decided that they must belong to a canal or navigation to be the subject matter of compensation, as O'Connor, L.J., points out in his dissenting judgment in *Milligan v. The Corporation of Londonderry* (2) at p. 11. Moreover, on a general view of the Lord Chancellor's judgment it may be remarked that if he had been merely deciding that a fence is not *ejusdem generis* with a bank or gate, he would have said so in very different words and would not have embarked on an unnecessary analysis of the section, and a perusal of the very clear arguments presented to the Court bears this out.

(1) [1910] 2 I.R. 25. (2) [1920] 2 I.R. 1.

Holmes, L.J., however, in a concurring judgment makes the basis of this decision clear. He says, p. 28: "The words 'other work' in this section must be "taken to be *ejusdem generis* with what went before, "and it is a matter of certainty that, if we are to "construe them in that particular way, they must "refer to something connected with a canal or navi- "gation, because all the previous words would be "misdescription if otherwise applied."

The Lord Justice therefore also treats the Lord Chancellor's fifth subject matter as being one subject matter linked together by the descriptive words "belonging to any person, public canal or navigation." and the *genera* to which he applies the *ejusdem* rule are also works connected with a canal or navigation.

It may be that the *ejusdem generis* rule does not apply in *Bell's case* (1) for the reasons I have given, but whether this be so or not, both the Lord Chancellor, Holmes, L.J., and Cherry, L.J., concurring, decided that the work enumerated or other work must all be connected with a canal or navigation, and this was the basis of the decision which I accept as the true construction of the section.

In *Milligan v. The Corporation of Londonderry* (2), another Court of Appeal had to deal with a case in which the claim was in respect of a gate unconnected with a canal or navigation. Again the arguments were clearly presented and an attempt was made to distinguish *Bell's case* (2) on the ground that the passage cited from the judgment of Holmes, L.J., was *obiter* and that the point in issue, namely, whether a gate "belonging to any person" was within the statute did not arise in *Bell's case* (1). This argument was accepted by Campbell, L.C., and Ronan, L.J., but rejected by O'Connor, L.J., who held that *Bell's case* (2) was binding on the Court, as it was if it decided the point at issue, and the Lord Chancellor agreed in this, for he says at p. 5: "I need hardly say that if it has "been held in this Court that when the Legislature "provided compensation in express terms for malicious "injury to 'any gate belonging to any person,' it only

(1) [1910] 2 I.R. 25. (2) [1920] 2 I.R. 1.

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"intended to provide it in the exceptional case of a "gate belonging to a canal or navigation, I should "loyally follow the decision, even though I was totally "unable to comprehend it; but I am satisfied that no "sanction for any such startling proposition is to be "found in the judgments of the majority of the Court, "and that the point and only point upon which the "members of the Court were agreed is to be found "clearly enunciated in the judgment of Walker, C." ; and he goes on to say, p. 6, that it is absolutely plain and clear that the point which Walker, C., decided, and which he (Walker, C.) understood to be the point upon which the members of the Court were agreed, was that a fence of the kind was not *ejusdem generis* with a gate.

Sir James Campbell then dismisses the judgment of Holmes, L.J., to the effect that "other work" must be connected with a canal or navigation, saying that both his reasoning and conclusion are far-fetched and fallacious, and, having thus limited the scope of the decision in *Bell's case* (1), proceeds to say: "I am free "to find, and do find, that the gate in this case, of "which the applicant was the owner, was 'a gate "'belonging to a person,' and therefore included in "the section by express reference and intention."

Ronan, L.J., concurred, but O'Connor, L.J., dissented on the ground that the Court was bound by the decision in *Bell's case* (1), with which he agreed.

In my opinion O'Connor, L.J., was right, and the words "other work belonging to any person" cannot be taken out of the section and construed apart from their context without any regard to the objects, history and framework of the Act. To do so and to hold, with Sir James Campbell, that they include every bank, etc., belonging to any person would certainly be no less strange and unintelligible than the construction adopted by the Court in *Bell's case* (1), which the Lord Chancellor has so vehemently criticised.

The section deals in the main with agricultural property and was designed to compensate owners for the then prevalent agrarian outrages. A series

(1) [1910] 2 I.R. 25.

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of classes of real and personal property are included and though some of these classes are general, the section was not intended to apply to all real and personal property or to be a general act. The section being so limited must be construed to cover only such property as can be shown to be within its terms, and its scope cannot be extended by holding that it is a remedial act to be construed liberally. No doubt it is a remedial act from the point of view of the applicant but it is punitive as regards the ratepayers and was intended to be so by Parliament.

The subsequent case of *O'Meara v. The County Council of Tipperary, N.R.* (1), is a decision of Ronan, L.J., in which he applied the principle adopted by Campbell, L.C., and himself in *Milligan's case* (2) to a subject matter not expressly named in the section as being "other work" *ejusdem generis* with "bank." This decision stands or falls with the decision in *Milligan's case* (2) and it is only of importance as showing that the Lord Justice considered that the decision in *Bell's case* (3) had been over-ruled in *Milligan's case* (2) and not merely distinguished—and this the Court had no power to do.

In my opinion *Bell's case* (3) was rightly decided and the application in this case accordingly fails.

MURPHY, L.J.

MURPHY, L.J.: I agree. In the course of his interesting argument Mr. Stewart (on behalf of the applicant) submitted that the words "any bank, gate, "lock, weir, sluice, bridge, dam," in section 135 of the Grand Jury (Ireland) Act, 1836, did not, *per se*, constitute a genus, and that they would only form a genus if, on the true construction of the section, they were connected with a canal or navigation, or, in the words of Perrin, J., in *Re Fitzpatrick* (4), "were con- "fined to waterworks." Mr. Stewart then argued that the decision of the Irish Court of Appeal in *Milligan's case* (2) was correct and that these words were not so confined.

(1) 54 I.L.T.R. 106.
(2) [1920] 2 I.R. 1.
(3) [1910] 2 I.R. 25.
(4) Ir. Cir. R. 819.

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Lord Justice Babington has shown how these words came to be introduced into section 135, and I agree with the reasons he has given for his judgment.

Mr. Stewart was correct, in my opinion, when he argued that the only nexus which could constitute a genus out of the words "any bank, gate," etc., is to be found in their connection with a canal or navigation, and, in my opinion, this principle is implicit in the several reported cases in which a limited meaning has been given to the words "or other work belonging to "any person."

It is in my opinion clear that the weight of authority is overwhelmingly in favour of a limited construction of these words. *The Athlone Boat Club case* (1) is a decision in 1877 of all the Judges (including Palles, L.C.B.), on a case stated by May, C.J., by which it was held that a pleasure boat, although clearly a "work," did not come within the section. Baron Dowse in *In re Collier* (2), and *In re Revington* (3), adopted a limited construction of these words, as did Deasy, L.J., in *Lord Cloncurry's Presentment* (4), Murphy, J., in *McCourt's case* (5), and Andrews, J., in *The Gort Club case* (6). As against these decisions there is *Re Fitzpatrick* (7), in which, from the short report of his judgment, it may be fairly assumed that if Perrin, J., had not considered that section 135 was remedial and so should be construed "liberally" he would not have given the wide meaning contended for to the words "other work."

This "liberal" construction of statutes was described by Pollock, B., in *Hill v. Managers of The Metropolitan Asylum District* (8), at p. 442, as a "dangerous "doctrine," and, as Lord Justice Babington has pointed out, the section is only "remedial" from the point of view of the applicant. As to the other cases mentioned as supporting the wide construction of the words "other work," in *Grattan Bellew's case* (Brett

(1) I.R. 11 C.L. 237; 11 I.L. T.R. 76 (1877).
(2) 8 I.L.T.R. 208 (1874).
(3) 15 I.L.T.R. 50 (1881).
(4) 16 I.L.T. 132 (1883).
(5) 24 I.L.T.R. 10 (1888).
(6) 28 I.L.T.R. 138 (1894).
(7) Ir. Cir. R. 819 (1843).
(8) 4 Q.B.D. 433.

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Criminal Injuries, page 51) the question was never argued; *Re Canavan* (1) was a decision of May, C.J., on the service of notices and the admissibility of a certified copy of an information; *re Keane* (2) (a decision of Sir P. O'Brien, L.C.J.), was in fact a decision in favour of the *limited* construction of these words, and compensation for a damaged car was held not to come within Section 135 but, under the circumstances of that case, to come within 16 & 17 Vict., c. 38, s. 1. In *Re Bracken* (Brett, page 57), Johnson, J., followed *re Keane* (2) and applied the provisions of 16 & 17 Vict., c. 38, to the case before him. This is, again, a case in which the limited construction of the words in section 135 was the foundation of the judgment.

The case of *Re Wexford Malicious Injury*, referred to in Brett at page 57 and not reported, may well have been also a decision under 16 & 17 Vict., c. 38.

Such being the authorities prior to 1910, it is not surprising that in *Bell's case* (3), Holmes, L.J., said: "I have always understood, however, that it was "definitely settled prior to the passing of the Local "Government Act of 1898, that the words 'other work' "in this section of the Grand Jury Act must be taken "to be *ejusdem generis* with what went before."

MEGAW, J.

MEGAW, J.: I concur and propose to add nothing to the very clear and convincing judgments already pronounced.

In my opinion the facts in this case are as near those in the reported case of *Bell v. King's County County Council* (3) as any two cases can be. That was a case where compensation was allowed in respect of a wire fence adjoining a road but not connected with any canal or navigation, which was maliciously destroyed, and a strong Court of Appeal, having considered all previously reported cases, unanimously came to the conclusion that the case did not come within section 135 of the Grand Jury Act, 1836. Walker, L.C., distinctly held that the words "other work" were *ejusdem generis* with the particular subject matter

(1) 11 I.L.T.R. 84.
(2) 27 I.L.T.R. 122.
(3) [1910] 2 I.R. 25.

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with which they were coupled, and I certainly gather from his words that by this he meant that the words "canal or navigation" qualified any right to compensation that might exist. It is perfectly clear from the judgment of Holmes, L.J., that he so held.

I cannot entirely appreciate the distinction that was drawn between that case and *Milligan v. Corporation of Londonderry* (1), by the majority of the Court, but I cannot regard the authority of *Bell's case* (2) as being affected, and I am satisfied that the law in the matter stood, when our Courts were formed, as it was laid down in *Bell's case* (2), and that there has been nothing done since by legislation to alter the law.

Solicitor for the appellant: *Bernard Campbell.*
Solicitor for the respondents: *W. Martin.*

J. McC.

(1) [1920] 2 I.R. 1.
(2) [1910] 2 I.R. 25.

BOYD v. ANTRIM COUNTY COUNCIL.

C.A. 1940.

Nov. 27. Dec. 4.

Criminal injury—Compensation—Grand Jury Act (Ireland), 1836 (6 *& 7 Wm.* 4, *c.* 116, *sec.* 135)—"*Wantonly burning.*"

A boy aged fourteen years was playing in a shed containing hay. He struck a match and ignited some petrol which was lying on the floor. He had no intention or expectation that the fire would spread further. The fire spread and destroyed the shed and the hay.

Held, that the burning of the shed and the hay was not "wanton."

APPEAL to the Judge of Assize from a decree of the Acting County Court Judge of County Antrim awarding compensation for criminal injury.

The facts appear in the judgment.

Fox, K.C. and *Belford* for the applicant.

Ellison, K.C. and *Stewart* for the Ballymoney Rural District Council.

Agnew, for the Antrim County Council.

Babbington, L.J., reserved judgment.

BABINGTON, L.J.

BABINGTON, L.J.: The applicant in this case is the owner of a considerable dairy farm between Ballymena and Coleraine, and on 7th July, 1940, two boys evacuated from Belfast were compulsorily billeted in his house. The elder boy was just over fourteen years of age and the younger twelve.

In the applicant's yard there was a shed open in front and divided into compartments by upright supports. On Saturday, 3rd August, 1940, all these compartments were full of hay, save one, in which there was standing a farm cart and in front of it a Fordson tractor with its radiator facing out to the yard. This tractor had been in use that day up to 12 noon, when work ceased, and there was apparently a small quantity of petrol remaining in the carburettor which the driver said could be drained off by turning a tap which was easily accessible.

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The applicant was going to Ballymoney about 8 p.m. on that evening and saw the two boys playing around the tractor and told them to get out of the shed. Soon after this his wife had occasion to go into the yard and saw them still playing about the tractor, the elder boy being in the driver's seat and the younger having the starting handle in his hand. She also told them to come away. From three to five minutes later the boys came into the house and told her that the hay was on fire. She went out and with the help of a girl got the tractor out of the shed and a bull out of a neighbouring byre, but the shed itself and thirty-five tons of hay were destroyed.

What happened between the time when Mrs. Boyd saw the boys at the tractor and told them to come away and the time when they reported that the hay was on fire was told by the younger boy. He corroborated Mr. and Mrs. Boyd as to the warnings given them and said that his companion was in the driver's seat working at the controls while he was at the starting handle. He noticed petrol or oil on the floor which he saw dripping from the tractor. The precise way in which this inflammable liquid was released did not appear, but it is quite clear that it came from the carburettor. The boy said that when Mrs. Boyd went away his companion got off the tractor and he left the starting handle. His companion then produced a match from his pocket and struck it. He saw a fire start beside the tractor but he did not see what his companion had done with the match and did not see it fall out of his hand. He said that his companion told him to say that he had dropped the match and on the Sunday morning he told the police that he had seen the match fall out of his companion's hand. They then got a bucket of water and tried to put the fire out but when they found this impossible the elder boy ran for Mrs. Boyd.

Whether the younger boy has told the truth as to what he saw is immaterial because it is beyond doubt that the elder boy struck a match and applied it to the petrol on the ground with the knowledge or hope that it would ignite, but there is no evidence to suggest

that he was endeavouring either to burn the tractor or do anything but amuse himself in a thoughtless and irresponsible manner, or that he had any intention of burning the hay, for, as Mr. Fox admitted, he never anticipated that the fire would spread. On these facts I find that the boys did not intend to burn the hay.

An attempt was made to prove that this boy was criminally minded and evidence was given that after the fire he said to the man who drove the tractor that "it was a pity the bull was not burned for we would "have had plenty of roast beef"; and a week later to another man working with Mr. Boyd: "I wonder "what we could light to-night to keep you all from "going to the town." I attach little or no importance to these statements, even if they were made. At the most they show the boy to have been irresponsible but not necessarily criminal, and they cannot outweigh the direct evidence as to the way in which this hay and shed were set on fire.

The claim is based on section 135 of the Grand Jury (Ireland) Act, 1836, under which compensation can be awarded for maliciously or wantonly setting fire to or burning any house, outhouse and other building or any hay, &c. It was admitted that there was no evidence of malice either express or implied, but Mr. Fox argued that the act of the boy in setting fire to the petrol was wanton and that this wanton act was the cause of the fire, and he relied on the dictum of Holmes, L.J., in *McDowell v. Corporation of Dublin* (1), at p. 555, where he says that "section 135 "of the Act of 1836 begins with cases of 'maliciously "'or wantonly' destroying or injuring property by "certain specified methods. Now, 'wantonly' means "recklessly, thoughtlessly, or without regard for right "or consequences. It would be strange if damage "arising from an act done in mere vacancy of mind, "and without any intent to destroy or injure, should be "made the subject of compensation, if damage inflicted "wilfully and deliberately is outside the Act unless "it is shown to be the outcome of spite or hatred."

(1) [1903] 2 I.R. 541.

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It is important to remember that what Holmes, L.J., was dealing with in *McDowell's* case (1) was whether an act of damage to property admittedly wrongful and deliberate can be malicious where no malice against the owner is proved. The Lord Justice held that an act of this nature is malicious, and all that he is saying in the passage so strongly relied on by Mr. Fox is that it would be strange if this were otherwise, since in the case of a wanton act it is unnecessary to prove spite or hatred.

A wanton act must be a wrongful act and it may be done without intent to injure anyone, but the intent to do the act itself must be present, otherwise the occurrence is an accident. An involuntary or unintentional act cannot be wanton, and when Holmes, L.J., speaks of vacancy of mind I take him to be referring to absence of intention to injure, or in other words to a mind vacant of malice and not to a mind vacant of intention to do the act, and I cannot read this passage as an authority for the proposition that compensation can be awarded where there is no proof of intention to destroy the property or where such intention is negatived.

The statute was passed to compensate people for damage done by criminal and illegal acts and not as a measure of insurance against accidents. Section 5 of the Local Government (Ireland) Act, 1898, makes this clear, and I must be satisfied that the act complained of was a criminal one.

Laffan v. Cashel Urban District Council (2) is a decision upon section 135 and is directly in point. That was a case in which a house and straw stored in it had been burned. The burning was unexplained and it might have been malicious or wanton or it might have been the result of accident, and at p. 204, Fitzgibbon, L.J., says: "An innocent member of the "community might have been lighting his pipe at "the moment of passing the house, and threw the "match away in such a manner that it fell through the "window; or the fire might have been caused by "children. But negligence is not enough to make

(1) [1903] 2 I.R. 541. (2) 35 I.L.T.R. 203.

"the ratepayers liable. It must be a crime, and I, "as a juror think that the applicant has failed to "prove that the fire was the result of such."

Fitzgibbon, L.J., assumes that if the damage had been caused by children, which was a possibility, it could have been neither malicious or wanton, and this is so in the case of young children. Here, however, the elder boy was over fourteen years of age and was capable of a malicious or wanton act, but it would have to be proved that he did it intentionally and that it was a criminal as distinguished from a merely mischievous act.

The act of this boy in lighting the petrol was intentional, but I hold that it was not done with intent to destroy and that it was not a criminal act within the Criminal Injury code. Even if some degree of criminality could be inferred from the act of the boy in lighting the petrol, I think the inference ceases to apply to the subsequent burning of the hay and shed when it is proved that there was no intent to burn the hay. *Woodley v. Cork County Council* (1). There K. burned heather on his own lands contrary to law. The fire spread to the adjoining lands but it was not the intention of K. that these lands should be burned or injured. It was argued that he must be presumed to have intended the natural and probable consequences of his unlawful act, and Palles, C.B., having had his attention called to the case of *Tyrone County Council v. Ogilvy* (2) (a decision of Holmes, L.J.), offered to state a case, giving his own opinion that the applicant could not succeed. The case was adjourned and on a case stated at a subsequent assize by Johnson, J., the Court of Appeal, consisting of Sir Samuel Walker, L.C., and Holmes and Cherry, L.JJ., upheld this opinion and distinguished *McDowell's* case (3) on the ground that intent is a necessary ingredient of a criminal injury following *The Queen v. Pembliton* (4).

Woodley's case (1) must be taken as overruling *The Tyrone County Council v. Ogilvy* (2) and *Dunalley*

(1) [1910] 2 I.R. 29.
(2) 35 I.L.T.R. 242.
(3) [1903] 2 I.R. 541.
(4) L.R. 2 C.C.R. 119.

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v. County Council of County Tipperary (*N.R.*) (1), and it shows that if intention is negative there can be no *mens rea* and the act is not criminal.

It has long been settled that a person must be taken to have intended the natural and probable consequences of his own acts, *R. v. Dixon* (2), but this inference may be negatived by the facts, as in the present case, or by direct evidence, as it apparently was in *Woodley's* case (3).

The decree of the County Court Judge will be reversed but I will give no costs in the Court below as I consider this a case of great hardship on the applicant, and no costs in this Court, as I am not satisfied that the County Court Judge would have awarded compensation if all the authorities had been cited to him.

Solicitors for the applicant : *Thomas Taggart & Sons.*

Solicitor for the Antrim County Council : *William Currie.*

Solicitors for the Ballymoney Rural District Council : *Greer, Hamilton & Gailey.*

M. W. G.

(1) 39 I.L.T.R. 184.
(2) 3 M. & S. 11.
(3) [1910] 2 I.R. 29.

STEELE v. ROBERT GEORGE & COMPANY (1937), LIMITED.

C.A. 1940.

Dec. 16.

1941.

Jan. 24.

Employer and Workman—Compensation—Refusal to undergo Surgical Operation—Right to further compensation—Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 *Geo.* 5, *c.* 16), *sec.* 9 (1).

A workman was injured by accident in the course of his employment as a joiner and in consequence suffered pain in standing, by reason of which he was totally incapacitated for work. Two eminent surgeons advised him to undergo a certain operation which would make his ankle joint stiff, but which in their opinion would, if successful, relieve the pain and enable him to do all the work of a joiner, and if unsuccessful would not make him any more incapacitated for work than he was. The workman's surgeon was of the opinion that if the operation were successful it would relieve the pain and enable the workman to do the greater part of the work of a joiner, but that its success was doubtful, and he advised the workman not to undergo it. Such an operation was the only remedy and it was not a serious operation. The workman refused to undergo the operation, and the employers, who had thitherto paid compensation, discontinued the payment.

Held, that the workman acted unreasonably in refusing to undergo the operation, and that he was not entitled to an award of compensation.

APPEAL from an award made by the Recorder of Belfast under the Workmen's Compensation Act (Northern Ireland), 1927, of compensation to be paid by the appellants to the respondent.

The facts appear in the judgment of Andrews, L.C.J.

Fox, K.C., and *Sheil* for the appellants :—

The only question is whether the respondent acted reasonably in refusing to undergo an operation on the ground that a competent surgeon has advised him not to do so. The respondents' surgeon said that the result of the operation was " problematical " ; he did not say that in his opinion it would not be successful, nor did he give any reason why it should not be successful ; it is on this evidence that the Recorder

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bases his decision. In *Fyfe v. Fife Coal Co., Ltd.* (1), Lord Clyde, Lord President, said that: "the question "remains whether the man acted reasonably or not. "No doubt he got advice from his own medical "advisers, but I think we are entitled, and bound on "the authorities, to take into consideration the "nature of that advice, and the reasons which accord- "ing to the findings, were given for it." The Recorder has found that the operation is one which a man might reasonably undergo, and that the alternative is "a lifetime of pain and idleness."

[They also referred to *O'Neill v. John Brown & Co., Ltd.* (2); *Zikking v. Thomas Swift & Co., Ltd.* (3); *Purvis v. Goole Steam Shipping* (*L. M. S. Railway*) (4).

Campbell, K.C., and *Agnew* for the respondent:—

The question in this case is purely a question of fact. The Recorder has held as a fact that the respondent was not unreasonable in following the advice of a competent surgeon. The facts are very similar to those in *Fife Coal Co., Ltd. v. Cant* (5). In that case also the employers alleged that the workman's incapacity was due to his unreasonable conduct in refusing to undergo one of two surgical operations which their surgeon thought likely to restore in a large measure the use of his right hand; the workman's medical man thought that the good which might result from the suggested operations would be negligible, and advised him not to undergo either of them. The Sheriff-Substitute found that the proposed operations were not attended with any great risk or excessive suffering and were likely to increase the usefulness of the hand, but that the employers had failed to show that the man's incapacity was due to his unreasonable refusal to undergo the operation, and he dismissed an application to terminate the compensation; the House of Lords held that there was evidence to support the decision and no misdirection. In this present case

(1) 19 B.W.C.C. 786, 797.
(2) 6 B.W.C.C. 428.
(3) 26 B.W.C.C. 53.
(4) 30 B.W.C.C. 330.
(5) 13 B.W.C.C. 449.

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even if the suggested operation were successful the applicant would have a stiff ankle which would be a serious handicap in obtaining and in performing work. In *Gracie v. Clyde Spinning Co., Ltd.* (1), in which there was a similar conflict of medical opinion, the Lord President of the Court of Session said in his judgment: "I am prepared to hold that, save in very "exceptional circumstances, the proximate cause of "incapacity never can be the unreasonable refusal "of a workman to undergo an operation, if his own "medical adviser advises him against undergoing "that operation."

[They also referred to *Tutton v. Owners of the S.S.* "*Majestic*" (2); *Donnelly v. Baird & Co., Ltd.* (3).

ANDREWS, L.C.J.

Jan. 24. 1941

ANDREWS, L.C.J.: The question as to whether a workman, who has met with an accident, has, by refusal to undergo an operation, forfeited his right to receive further compensation, or, as it is perhaps better expressed, precluded himself from further insisting on his claim, has been debated in numerous reported cases. These cases have been so frequently reviewed by the House of Lords, the Court of Appeal in England and the Court of Session in Scotland, that I do not propose to engage in the unprofitable task of an unnecessarily exhaustive survey. The facts of one case are seldom, if ever, identical with those of another; and it is the principles underlying the decisions rather than the decisions themselves, which alone provide assistance in subsequent cases.

I propose to state briefly some of these principles which appear to me to be now so well established that they cannot any longer be questioned.

First, there is nothing in the Workmen's Compensation code which imposes on a workman an absolute obligation to submit to a surgical operation or even to undergo any special form of treatment. *Donnelly v. Baird & Co., Ltd.* (3), at p. 101, and *Warncken v. Moreland & Son, Ltd.* (4), at p. 188.

(1) [1915] S.C. 906.
(2) [1909] 2 K.B. 54.
(3) 1 B.W.C.C. 95.
(4) [1909] 1 K.B. 184.

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Secondly, as between himself and his employer an injured workman must at all times act reasonably. It is his duty to aid his recovery by all reasonable means. If by his neglect or misconduct he aggravates his injury and incapacity for work, or if its continuance results from such subsequent unreasonable conduct, it cannot be regarded in law as a consequence of the accident ; it is due to his own unreasonableness. *Warncken v. Moreland & Son, Ltd.* (1), at p. 188. Lord McLaren expressed the workman's duty briefly and accurately when he said in *Donnelly v. Baird* (2) that "the statutory obligation of the employer to give "maintenance during the period of incapacity resulting "from an accident, is subject to the implied condition "that the workman shall avail himself of such reason-"able remedial measures as are within his power." If he refuses to submit to an operation from defect of moral courage or because he is content to put up with the disablement and is willing to live on a pittance under the Workmen's Compensation Act he is not entitled to compensation. To borrow the language of the Lord Justice Clerk the workman should do what a man of ordinarily manly character would do for his own good in a case where no question of compensation being due by another existed.

Thirdly, it is this test of reasonableness which determines whether an injured workman who insists upon the continuance of payment of compensation should submit to a surgical operation. If in all the circumstances of the case his refusal to undergo such operation is unreasonable he disentitles himself to further compensation, for his incapacity ceases any longer to be the result of the accident.

Fourthly, the question of reasonableness is in each case one of fact, or one of inference from fact, for the arbitrator ; and, in determining whether an operation is advisable and whether it should be submitted to by the workman, the arbitrator must bear in mind that the burden of proof rests upon the employer to show that the workman ought to submit to it.

(1) [1909] 1 K.B. 184. (2) 1 B.W.C.C. 95.

Fifthly, a workman should not be held to be unreasonable in refusing to submit to an operation unless it is established—

(*a*) That it would probably result in the removal or at least in the reduction of the workman's inability to work. *Marshall v. Orient Steam Navigation Co., Ltd.* (1), at p. 86; and

(*b*) That the condition of the workman's health and the nature of the operation is such that its performance would not be attended with substantial or appreciable risk to the workman, or extraordinary suffering.

It remains for me to consider the arbitrator's duty when there exists a difference of medical or surgical opinion as to the advisability of the proposed operation or treatment, or as to the advantages to be derived from it. This is the most important issue in the present case. Different medical men may honestly arrive at different conclusions either from the general condition of a workman's health and the risk which would be involved in his case, or because of the measure of success, particularly in regard to capacity for work, which might reasonably be expected to result from it. How should a difficulty of this character be resolved by the arbitrator? In one of the earlier reported cases, *O'Neill v. John Brown & Co., Ltd.* (2), the workman was advised not to submit to the operation by two doctors who considered that, though there was no danger at all attached to the operation—the removal of the painful stumps of two toes—it would prove of no benefit in curing the incapacity. Three other doctors were of the contrary opinion. The Court of Session held that there was evidence to support the finding of the Sheriff-Substitute that the success of the operation was "reasonably certain," and that the incapacity was due to the refusal to undergo the operation and not to the original injury by accident. Compensation was accordingly reduced to what was called "the traditional penny." Even the opinion of two doctors who advised against an operation did not make the workman's refusal reason-

(1) [1910] 1 K.B. 79. (2) 6 B.W.C.C. 428.

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able. Lord Dundas, in the course of his judgment, referred (at p. 432) to *Tutton v. Owners of S.S. "Majestic"* (1), pointing out that that case does not support the proposition that if a man *bona fide* refuses to undergo an operation upon the advice of a qualified medical practitioner that must be taken as a complete answer to any suggestion that he is unreasonable in refusing to undergo it. A mere difference of medical opinion cannot be held to import that the refusal to undergo an operation is reasonable. "If any such "doctrine," he said, "were to be laid down this part "of the Act would really become a dead letter, because "in the wide world of medicine I should think it would "almost always be possible to obtain a perfectly "genuine though eccentric opinion from some qualified "medical man to any effect that might be desired "within limits."

Next there followed *Gracie v. Clyde Spinning Co., Ltd.* (2), in which the view was expressed by the Lord President that, save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo an operation if his own medical adviser advises him against it. This, the Lord President said, was the result of the decision in the still earlier Scotch case of *Sweeney v. Pumpherston Oil Co., Ltd.* (3). In my opinion this proposition is somewhat overstated, and to such extent it is not supported by subsequent authority. Thus in *Fife Coal Co., Ltd. v. Cant* (4), in which the House of Lords held that there was evidence to support the decision of the Sheriff-Substitute who dismissed the employers' application to terminate the compensation, Lord Birkenhead, L.C., said: "This is "not, of course, to lay down as a general rule that in "every case, whatever the circumstances may be, an "applicant is excused from the obligation to adopt a "reasonable course, because he has received advice "to the contrary from his own medical adviser. "One must in each of these cases consider the circum-

(1) [1909] 2 K.B. 54.
(2) 8 B.W.C.C. 630.
(3) 40 S.L.R. 721.
(4) 13 B.W.C.C. 449.

"stances." Again in *Fyfe v. Fife Coal Co., Ltd.* (1), the workman failed notwithstanding the fact that in refusing to undergo certain treatment under a nerve specialist he was acting on the advice of his own doctors. The Lord President (Clyde) in the course of his judgment said (at p. 797) that no doubt the workman in acting as he did got advice from his own medical advisers, but he thought that the Court were entitled, and bound on the authorities, to take into consideration the nature of that advice and the reasons which, according to the findings, were given for it. Lord Blackburn opened his judgment with the words:— "There is no general rule that a man acts reasonably "or unreasonably in preferring to follow the advice "given by his own medical man rather than the "advice given by a medical referee." In the House of Lords Lord Dunedin stated that all that could be said was said in *Fyfe Coal Co. v. Cant* (2). There are simply two propositions and they stand together quite well. It is not necessarily unreasonable for a man to follow the advice of his own medical advisers ; on the other hand, it is not necessarily reasonable to do so if there are circumstances which show that there is advice to the contrary and if the reasons they give are not sufficient.

Zikking v. Swift & Co., Ltd. (3)—a decision of the English Court of Appeal—is one of the most recent cases on the subject. The facts of the case are strong. The workman underwent an operation for strangulated hernia. As a result he sustained an inguinal hernia. Two expert witnesses advised in favour of a further operation ; but the workman's panel doctor, who had never operated for hernia, advised against it. The judge of the Liverpool County Court who heard the case found the workman fit for the operation which would, in his opinion, probably result in a radical cure, and therefore he considered there must be strong reasons to justify the refusal to submit to the operation. He held, however, that it was on the whole reasonable that the workman should not be required to undergo

(1) 19 B.W.C.C. 786 ; 20 B.W.C.C. 548.
(2) 13 B.W.C.C. 449. (3) 26 B.W.C.C. 53.

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the operation or to lose his compensation, and he, therefore, made an award. The Court held that the advice of the panel doctor was not conclusive on the question of reasonableness, and that the Judge had not decided the question of fact whether the workman's conduct was reasonable or unreasonable. The case was accordingly remitted, Lord Hanworth, M.R., saying that the test is, has the workman been unreasonable ? The mere fact that his medical man has advised him against the operation does not necessarily justify him in following the advice of that medical man ; his own medical man's opinion is not conclusive on the question of reasonableness.

This case of *Zikking* (1) appears to me to bear a strong resemblance to the present in several of its essential details. Two eminent surgeons, including the one who attended the applicant in hospital from the day of his accident, strongly advise the operation, the effect of which would be to make the ankle joint stiff. The object of such an operation is to give relief from pain which is due to movement in the joint and consequent friction. They admit that it is not a common operation, and that it has not been very long in use, but it is the modern practice of treating such injuries which has given some excellent results. It is, they consider, a reasonable operation, involving no extra risk beyond that attaching to any operation, and the applicant is a healthy man. They consider that there is no reason to suspect that the applicant would not get a stable strong limb ; there is a very good chance of success. Those of us who know Mr. Irwin know how sincere he was when he said that he would not have advised the operation if he had not expected an improvement. A successful operation would, in the opinion of both these surgeons, make the applicant fit for his ordinary work—all the work of a joiner—and there was no reason to expect failure. If, however, the operation should prove unsuccessful the applicant would not be made any worse than at present for doing his work.

(1) 26 B.W.C.C. 53.

Mr. Wright, the surgeon to whom the applicant was sent by his Trade Union, did not see him until more than a year had elapsed from the time of the accident, and he only saw him once subsequently. He admitted that an operation to straighten and stiffen the joint would, if successful, relieve pain, which in his present condition he will always have if he stands any length of time. He considered, however, that such an operation is "problematical," which I interpret as meaning doubtful in its result. He, accordingly, advised against it. He considered that if the operation were successful the applicant would be able to stand at the bench, but he thought he would find it difficult and risky to climb ladders, that there was no other remedy and the operation was not a serious one.

The applicant's own evidence was that he refused to submit to the operation on Mr. Wright's advice. Had the latter advised that he would be fit for work he would have had the operation. Even if Mr. Irwin said that he would have freedom from pain and a reasonable chance of being fit for work he would not have it. He was willing to have the operation if it would make him the same as before. He would "chance" it if he had any "guarantee" that it would make a good job. If he had a "guarantee" that he would have no pain, and a reasonable chance of working, he would have it.

In these circumstances the learned Recorder, who heard all the witnesses giving their evidence, came to the conclusion in the first place that the applicant seemed more anxious to establish his right under the Workmen's Compensation Act than to get well. On the balance of evidence he considered that the operation was one which a man might reasonably undergo, as it afforded a reasonable chance of relief from pain and of ability to do some work, the alternative being a lifetime of pain and idleness. He further considered that, though suffering from a stiff ankle, a joiner can earn wages. All these findings are in favour of the respondents; but he decided the case against them on the one ground that he "could not hold the claimant "unreasonable in following the advice of a competent

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"surgeon in the present case." In this finding, at which he appears to have arrived without considering the grounds or the sufficiency of the reasons advanced by the surgeons in support of his opinion, the learned Recorder was, in my opinion, in error on the authorities to which I have referred, and on this vital issue he accordingly misdirected himself. It was quite competent for him to hold that the applicant was unreasonable notwithstanding Mr. Wright's opinion against the operation; and, as every other fact in the case favoured the operation, in my opinion it was unreasonable for the applicant to base his judgment entirely on Mr. Wright's opinion with the object, as found by the Recorder, of establishing his right under the Workmen's Compensation Act, rather than take a course which would help him to get well. The learned Recorder's views could not be more clearly or forcibly expressed than in the concluding words of his Report in which he said that the claimant must have his rights under the Workmen's Compensation Act, even if it is the worse for him eventually.

I would only add in connection with this issue of the applicant's unreasonableness, that in my opinion he was clearly unreasonable in refusing to undergo the operation without obtaining a "guarantee" of success. From the very nature of an operation a guarantee of success cannot be given. A qualified competent surgeon can go as far as Mr. Irwin and Major Frazer did—he can advise the operation and express his belief that it would be successful, but he cannot and should not be expected to guarantee it. If, in requiring such guarantee, he was acting as I hold unreasonably, I am unable to see why the respondents should be condemned to make a substantial weekly payment for an indefinite period which, on the evidence, they would in all probability not be required to make if the applicant acted reasonably and submitted to the operation.

The only question which remains to be considered is whether we should remit the case to the Recorder or deal with it finally ourselves. I should unhesitatingly recommend the adoption of the former course

if any important issue of fact remained undetermined. But all necessary findings of fact are before us in the learned Recorder's notes; and in my opinion it is competent for us to discharge the Award appealed from and in its place to substitute a mere declaration of liability which will preserve the applicant's rights in the event of his undergoing the operation and of its proving unsuccessful. The respondents are entitled to their costs of the appeal. We shall leave each party to abide his own costs of the hearing before the Recorder.

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I would wish to add these few words of general import to my judgment.

While the value and general accuracy of the series of Reports known as Butterworth's "Workmen's "Compensation Cases" are beyond question a comparison of the reports of the case of *Tutton v. Owners of S.S.* "*Majestic*" (1) shows that if a case is reported in the Law Reports it is essential that it should be cited from this source. The report of *Tutton's case* in the Butterworth series is necessarily abbreviated, and only the judgment of Cozens Hardy, M.R., which is obviously unrevised, is given. So also in *Warncken v. Moreland* (2), there are variations of some importance between the judgments as reported in Butterworth's Reports and in the Law Reports which further emphasise the importance of the direction which we give as to citation of authority in future cases.

BABINGTON, L.J.

BABINGTON, L.J.: I agree with the judgment delivered by the Lord Chief Justice and will only add that the Recorder's award as I read it finds that the applicant was unreasonable in not submitting to the operation in fact, but that he was not unreasonable in law because his refusal was based on the advice of his own doctor. There was ample evidence to support the conclusion that he should have submitted to the operation, and if this had been an open question in this Court I would have arrived at the same conclusion without hesitation notwithstanding the advice

(1) [1909] 2 K.B. 54; 2 B.W.C.C. 346.
(2) [1909] 1 K.B. 184; 2 B.W.C.C. 350.

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of his doctor. All the facts must be taken into consideration and the medical evidence on both sides weighed to see whether the applicant was reasonable in his refusal to undergo the operation which is the fact to be decided, and though the opinion or advice of his own doctor is a very material element it is not in law an over-riding test of reasonableness or unreasonableness.

BABINGTON, L.J.

To give it this effect would be to transfer to the applicant's doctor the duty which the Act casts upon the Arbitrator. An applicant may believe in the advice given him by his doctor, a state of mind upon which the Court is not called upon to express any opinion, and at the same time be unreasonable in refusing to undergo the operation, and the fact the Court has to ascertain is, whether this is so or not. I was at first inclined to the opinion that the case should go back to the Recorder but I am now satisfied that he has found all the facts and that the question we have to decide is one of law.

MURPHY, L.J.

MURPHY, L.J.: I agree, and would add nothing if we were not differing from the learned Recorder.

As stated by Fletcher Moulton, L.J., in *Warncken v. R. Moreland & Son, Ltd.* (1), at p. 189, "a workman "must behave reasonably, and if the incapacity, or "the continuance of the incapacity after a certain "time, is due to the fact that he has not behaved "reasonably, then the continuing incapacity is not "a consequence of the accident, but a consequence "of his own unreasonableness."

The question whether or not a workman has acted reasonably in refusing treatment, medical or surgical, is one of fact, but this question must be determined on the whole evidence, and while the opinion of the workman's doctor (if the competency or the *bona fides* of such doctor is not successfully impeached) must be regarded as a factor of primary importance. (*Tutton v. Owners of S.S. "Majestic"* (2); *Gracie v. Clyde Spinning Co.* (3)—especially if the workman cannot be expected to have any competence or knowledge as

(1) [1909] 1 K.B. 184.
(2) [1909] 2 K.B. 54.
(3) 8 B.W.C.C. 630.

to the subject matter of the advice (Hamilton, L.J., *Higgs & Hill, Ltd. v. Unicume* (1) (at p. 601)—such opinion is not conclusive (see *Cant v. Fife Coal Co.* (2)); Lord Skerrington at p. 77, same case (3) in House of Lords; *Fyfe v. Fife Coal Co.* (4); *Zikking v. Thomas Swift & Co., Ltd.* (5).

In the present case on all the disputed issues (save as to the effect of Surgeon Wright's opinion) the Recorder's findings were in favour of the appellants, and his award was based solely on the opinion expressed by Surgeon Wright.

The operation advised by Surgeons Irwin and Frazer (whose skill and experience were not, of course, questioned) is, admittedly, not a serious one, and (the Recorder finds) is one which a man might reasonably undergo; it "affords a reasonable chance of relief "and ability to do some work, and the alternative is "a lifetime of pain and idleness."

The respondent, as found by the Recorder, "seemed "more anxious to establish his right under Workmen's "Compensation than to get well." The Recorder "does not accept the contention that a joiner with a "stiff ankle can earn no money." The respondent in his evidence twice referred to his demand for a "guarantee" of the success of the operation, which, as in *Walsh v. Locke & Co.* (*Newland*), *Ltd.* (6), not even a surgeon of the eminence of Mr. Irwin could give him, and the respondent also says that he would be willing to have the operation "if it would make him the same "as before"—an obvious impossibility having regard to the intended effect of the operation.

The only reason advanced by Mr. Wright for advising against the operation is that "if not successful his "condition would be worse than before, inasmuch as "he would have no movement left at ankle joint." It seems to me that, whereas a successful operation would in Mr. Wright's opinion be of benefit to the respondent as preventing lateral movement of the ankle joint and thus relieving or removing the pain, Mr. Wright fears that if the operation were unsuccessful,

(1) [1913] 1 K.B. 595.
(2) 58 S.L.R. 74.
(3) 13 B.W.C.C. 449.
(4) 19 B.W.C.C. 786.
(5) 26 B.W.C.C. 53.
(6) 7 B.W.C.C. 117.

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both vertical and lateral movement of the joint would cease. But Mr. Wright does not suggest that even such an unsuccessful operation would not relieve or remove the pain, nor that the respondent, even with such a stiff ankle, could not stand at a bench. As the foot in its present condition is useless for weight bearing and standing for any length of time must bring on pain, I cannot see that Mr. Wright has given any intelligible reason against the operation. If, as Lord President Clyde says in *Fyfe v. Fife Coal Co.* (1), we are "bound on the authorities to take into consideration the nature of that advice" (i.e., that of the workman's own medical adviser) "and the reasons "which according to the findings were given for it," it appears to me that the opinion of Mr. Wright was "peculiar" and "indefensible," and the learned Recorder does not appear to have agreed with it.

It is, I think, a circumstance of some importance that Mr. Irwin was the surgeon who examined the respondent on the day of the accident and "saw him "constantly in his (Mr. Irwin's) ward in the Royal "Victoria Hospital." In advising the operation Mr. Irwin clearly acted in what he thought was in the best interests of the respondent. The respondent continued to attend the Royal Victoria Hospital after he had been sent by his Trade Union to Mr. Wright, on 13th February, 1939, and was seen by Mr. Irwin on several occasions after that date. Mr. Wright appears to have seen the respondent on two occasions only, with an interval of over a year between the dates.

The award of the learned Recorder is based solely on the fact that Mr. Wright advised against the operation, although every other fact in the case, as found by the Recorder or agreed, makes in favour of the operation, and having regard to the authorities, I agree that in so treating the opinion of Mr. Wright as conclusive on the question of the reasonableness of the respondent the learned Recorder misdirected himself.

Solicitor for the appellants: *H. J. Catchpole.*
Solicitors for the respondents: *J. Donnelly & Co.*

(1) 19 B.W.C.C. 786.

J. McC.

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May 15.
June 17.

Employer and Workman—Compensation—Accident—"Arising out "of and in the course of the Employment"—Onus of proof—Workmen's Compensation Act (Northern Ireland), 1927, (17 & 18 Geo. 5, c. 16), sec. 1, sub-ss. 1 & 2.

A workman in the course of his employment with the respondents had to mount a scaffold and, when on it, mark the position for a bracket. About 10 feet above the scaffold there was a beam on which a crane travelled. From the ground to the beam there was a ladder which could easily be reached from the scaffold by stepping across an open space. The workman went up to the beam, and when he was on it the crane crushed him, causing fatal injuries. He had no occasion to go up to the beam for the purpose of the work on which he was engaged, and there was no evidence to show why he did so.

The widow of the workman applied for compensation.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.):—

1. That the applicant had not discharged the onus which was on her of proving that the accident arose out of and in the course of the workman's employment.
2. That the accident was not to be deemed, under the Workmen's Compensation Act (Northern Ireland), 1927, sec. 1, sub-sec. 2, to have arisen out of and in the course of the workman's employment.

APPEAL by the applicant from an award of the Recorder of Belfast that the respondents were not liable to pay compensation under the Workmen's Compensation Act (Northern Ireland), 1927.

The facts are stated in the judgment of the Lord Chief Justice.

Campbell, K.C., and *Belford* for the appellants:—

The facts are consistent with the accident having happened out of and in the course of the workman's employment; he must have found it necessary to go up to the beam for the purposes of his work, there was nothing else to take him there. He was engaged at work within his employment until a moment before the accident, and the onus is on the respondents to

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prove that his last act causing the accident was inconsistent with his continuing within his employment. He was not at the time of the accident out of what Lord Mackenzie in *McWilliam v. Great North of Scotland Railway Co.* (1) called "the territory of his employment." In *Richard Evans & Company, Ltd. v. Astley* (2), Lord Robson said: "when a workman is "killed in the course of his employment while engaged "in some act reasonably consistent with his master's "service, I think it requires some more definite "evidence than the appellants can suggest in this "case in order to found the inference that he was "moved by a wrongful intention"; in this case there is no evidence to found such inference. The proper presumption is that this man did what led to the accident in continuing his employer's work, and not that he had ceased to do his employer's work and had commenced to do something for his own purposes.

Under the Workmen's Compensation Act, 1927, sec. 1, sub-s. 2, a fatal accident is to be deemed to arise out of and in the course of a workman's employment notwithstanding that he was acting in contravention of any orders given by his employer, or acting without instructions, if such act was done by him for the purposes of and in connection with his employer's business. *Noble v. Southern Railway Co.* (3), *Evans v. Blaenant Colliery Co., Ltd.* (4).

[They also referred to *Davidson & Co. v. McRobb or Officer* (5), *Newton v. Guest, Keen & Nettlefolds, Ltd.* (6), *Todd v. McCallum* (7), *Blair & Co., Ltd. v. Chilton* (8).]

Fox, K.C. and *Copeland* for the respondents:—

The job on which the workman was engaged did not take him to the place where the accident happened, and there is no evidence that he started to do anything there. *Millers v. North British Locomotive Co., Ltd.* (9); he had no right to be on the beam, and there is no

(1) 1914 S.C. 453, 458.
(2) [1911] A.C. 674, 687.
(3) [1940] A.C. 583.
(4) 33 B.W.C.C. 298.
(5) [1918] A.C. 304.
(6) 18 B.W.C.C. 1.
(7) [1932] N.I. 130.
(8) 84 L.J. (K.B.) 1147.
(9) [1909] S.C. 698.

evidence to show why he went there. This is not a case in which the workman was doing his work in the wrong place or in the wrong way, he was not doing his work at all. There is no evidence of any causal connection between the man's work and the injury. By going to the beam the man exposed himself to an additional peril. *Lancashire & Yorkshire Rly. Co. v. Highley* (1).

Section 1, sub-s. 2 of the Workmen's Compensation Act, 1927, has no application. There is no evidence that the man at the time when the accident happened was doing any act for the purposes of or in connection with the respondent's trade or business.

[They also referred to *Simpson v. London, Midland & Scottish Railway Co.* (2), *Harris v. Associated Portland Cement Manufacturers, Ltd.* (3).]

ANDREWS, L.C.J.

ANDREWS, L.C.J.: On 12th October last Robert Davidson, who was a fitter in the employment of the respondents, met with a fatal accident during working hours in his employers' premises. His widow's claim in these proceedings for compensation under the Workmen's Compensation Acts is contested on the ground that his death was not caused by accident arising out of his employment.

The work upon which the deceased was engaged upon the day of the accident was the erection of platers' cranes. It was part of his duty in the execution of this work to mount to a scaffold 22 feet high by a trestle ladder, and, after due measurement, to mark off on a stanchion, the exact position for a bracket 24 feet 9 inches from the ground. About 7 feet 3 inches above this bracket position was a longitudinal rail on the top of a beam on which moved a travelling crane. The deceased was apparently standing on this rail when the crane moved along and caught him against a stanchion. There was an iron ladder by which he could have got access from the scaffold to this rail, but this ladder really served the rail from the ground—not from the scaffold—and one would have to step across a gap to reach it from the scaffold. No witness

(1) [1917] A.C. 352.
(2) [1931] A.C. 351.
(3) [1939] A.C. 71.

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who was called at the hearing could suggest how the deceased could be helped in his work by going up above to this rail, or how, indeed, he could execute any part of his work on or from this position. It was not necessary for the purpose of marking the place for the bracket. Further, the evidence of the respondents' plant manager, James Bryce, upon this point to the effect that the deceased had no occasion to mount to the rail for the purpose of the work at which he was engaged was fully supported by Alexander Irvine, the deceased's mate and helper, who was the principal witness on behalf of the applicant. They had erected seven similar cranes in this machine-shop before the one in the erection of which they were then engaged; and Irvine agreed that the deceased had never been up on the beam before. It was the staging, that is the scaffold, that they had used for the erection of the rest of the cranes, and that was, he declared the sensible thing to do. No measurements were necessary above the scaffold. At the time of the accident he was, according to the further evidence of Irvine, "in a dangerous place without any need for him being "there."

Probably no phrase in our statute law has been so productive of litigation as that contained in the first section of the Workmen's Compensation Act which provides that an accident, to come within the scope of the Act, must arise out of and in the course of the workman's employment. The issues involved in determining whether an accident so arises are, in my opinion, mainly questions of fact; for it is the facts which must first be ascertained, and it is to them when so ascertained that the legal principles and definitions established by accepted authority must be applied. Accordingly, it is well settled that the Court of Appeal will only interfere with the findings of the arbitrator on such issues if he has misdirected himself in point of law, or if there be no evidence to support them. In determining the course of the employment regard is mainly had to when it begins and ends and the effect of its interruption. In determining whether an accident arose out of the employment one looks

mainly to see the work which the man was employed to do and what was incident to it. I dealt with the difference in meaning between the phrases "arising "out of" and "arising in the course of" the employment, in my judgment in this Court in the case of *Todd v. MacCallum* (1), at pp. 140-1, and, accordingly, I do not deem it necessary to dwell on such matters again. I would only amplify what I there stated by reference to and by the adoption of the passage to be found in Willis's Workmen's Compensation 33rd Edit. at p. 45, where, in considering the test as to whether an accident arises out of the employment, the learned authors say that so to hold it must be shewn that it is brought about by an act or omission on the part of a workman which he is authorised, expressly or impliedly, by his employer to perform or omit ; and that included in this will be an act which is not covered by express authorisation but is reasonably necessary or proper to be done.

The difficulty of the present case appears to me to arise entirely from the fact that no one saw the deceased workman going to the position where the accident occurred ; no one knows precisely when he went or how he got there, that is, whether he went directly to it from the ground by the iron ladder or whether he proceeded there from the scaffold—a few feet below —where he had a perfect right to be. Above all we do not know why he went. All that we do know from the evidence—and there is no controversy upon this point—is that there was no necessity for him to go there for the purpose of his work, and that by so going he was adding to the dangers of his employment. The rail of a moving crane, between which and the upright stanchion there was only a clearance of about six inches, was from its very nature a position to which workmen were never intended, never instructed, never invited or authorised to go. True, it may have been that Davidson conceived some purpose connected with his work, never thought of during the erection of the other cranes, which induced him to go there, but none such was suggested in evidence. It may

(1) [1932] N.I. 130.

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equally well be that he went for a purpose entirely of his own, wholly disconnected with the performance of his duties as a fitter, and in no sense reasonably necessary for their due or proper discharge.

In the absence of definite evidence upon these points it is necessary to consider the question of onus of proof. One of the earliest cases on this subject—the authority of which has not to my knowledge been questioned—is *Pomfret v. Lancashire and Yorkshire Railway Co.* (1), in which the Court of Appeal in England held that the onus of proving his case rests upon the applicant. As Collins, M.R., put it (at p. 721) "The burden, and the whole burden, of proving the "conditions essential to the obtaining an award of "compensation, rests upon the applicant and upon "nobody else, and if he leaves the case in doubt as to "whether those conditions are fulfilled or not, where "the known facts are equally consistent with their "having been fufilled or not fulfilled, he has not "discharged the onus which lies upon him." In such a case there is really no room for inference either way; for mere guess or conjecture must never be allowed to take the place of legitimate inference or deduction. On the other hand, where the known facts are not equally consistent, and a reasonable man might hold that the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in his favour (see speech of Lord Birkenhead, L.C., in *Lancaster v. Blackwell Colliery Co.* (2), at p. 406).

These propositions cannot in my opinion be controverted; but to them have been added others which will be found enunciated in *Willis* 33rd Edit., at pp. 119 and 120. I cite propositions 4 and 5 as having a particular relevance to the present case—a death claim. Proposition 4 reads as follows:—"In the "case of a death claim if it is shown that up to the "time of the accident the deceased workman had been "actually engaged in his employer's work, and that "the accident was caused by an act which was con-

(1) [1903] 2 K.B. 718.
(2) 12 B.W.C.C. 400.

"sistent with a continuance of that work, the proper "presumption is that the workman was doing that "act in continued performance of his work, and not "for some other purpose; and the onus of rebutting "the presumption by showing a cessation of working "for his employer rests upon the employer." Ample authority will be found for this proposition in the judgment of Fletcher Moulton, L.J., in *Astley v. Evans* (1). This presumption, however, only arises in cases in which it is established by evidence that the workman had been actually engaged in his employer's work immediately previous to the accident, and that his last known acts are consistent with the continuance of that work.

The fifth proposition to which I have referred applies to cases on the other side of the line. The proposition is thus expressed:—"If the facts show that at the "time of the accident the injured workman was doing "something outside the usual limits of his employ-"ment, or that he was at a place where he would not "usually be found in the course of his employment, "the onus of proof is not discharged until the applicant "has shown affirmatively that the act or the position "of the workman was justified by lawful orders or "recognised practice or the like." In support of this proposition one might cite such cases as *Edwards v. International Coal Co.* (2), *Millers v. North British Locomotive Co.* (3), and *Smith v. Stanton Ironworks Company Collieries, Ltd.* (4).

Now this proposition appears to me to apply to the present case, for the evidence indicates that immediately before the accident the workman must have been doing something outside the usual limits of his employment, and further, that he was at a place where he would not usually be found in the course of his employment. The applicant had, therefore, cast upon her an onus which she has entirely failed to discharge. She failed to produce evidence to show that the deceased in going to the place where he met with the accident was "doing something reasonably incidental to his

(1) [1911] 1 K.B. 1036, 1044.
(2) 5 W.C.C. 21.
(3) 2 B.W.C.C. 80.
(4) 6 B.W.C.C. 239.

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"employment." It was not "the mere doing of an "act recklessly or negligently which he had been "employed to do," but rather "the doing of a thing "altogether outside and unconnected with his em- "ployment"—something which was "not in the "contemplation of either party to the contract" something "not directly or indirectly imposed upon "him by his contract of service." These are all conclusions at which I have arrived upon questions which I have put to myself as tests with the full authority of many of the learned Lords who have endeavoured to solve the same problem as that with which we are confronted in the present case. Such tests are recognised and form the basis of the decision of the majority of the Supreme Court of Eire in the recent case of *O'Rourke v. Gunning* (1), a relevant and useful authority. I, accordingly, agree with the learned Recorder and accept his finding that there was no evidence to show that the accident arose out of the workman's employment.

Before the learned Recorder and also in our Court the applicant's case was alternatively presented under sect. 1 (2) of the Workmen's Compensation Act (N.I.), 1927, which is in terms identical with the provisions of sect. 1 (2) of the British Act of 1925. The provisions of this section were first introduced as section 7 in the Act of 1923. They apply only to cases of death or of serious and permanent disablement. By the sub-section an accident is in such a case "deemed" to arise out of and in the course of the workman's employment notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business. I have read all the more important cases decided upon this section, including several which came before the House of Lords, but I do not feel it necessary to make

(1) [1941] I.R. 108.

any detailed reference to them. In my opinion the sub-section cannot be called to the applicant's aid in the present case. It merely provides what Viscount Maugham, L.C., called in the recent case of *Noble v. Southern Railway Co.* (1), (at p. 590), "an artificial "extension of the actual scope of employment in the "particular circumstances mentioned," and subject to the special condition that the act which was being done at the time of the accident was done for the purposes of and in connection with—not the workman's job, but—his employer's trade or business. Now in the present case there is no suggestion that the workman was acting in contravention of any statutory or other regulation, or of any orders given by or on behalf of his employer—words which relate to a case where the prohibition is not general but is contained in an actual order given by the employer to the particular workman. I confess that I have some doubts as to whether the words "acting without instructions from "his employer" which have been construed as amounting to an "implied prohibition" (see speeches of Viscount Dunedin in *Wilson's & Clyde Coal Co. v. McFerrin* (2), at p. 386, and of Viscount Maugham in *Noble's case* (1), at p. 591) were intended to cover a case such as the present; but, assuming that they do, the applicant is in my opinion unable to claim relief under the section as she has failed to prove that the act which her husband was performing at the time of the accident was done by him "for the purposes of "and in connection with his employers' trade or "business." Here again, the House of Lords have laid it down in unmistakable terms that the onus of proof of this affirmative issue lies upon the workman, *Garrallan Coal Co. v. Anderson or Devlin* (3), at pp. 68 (Viscount Dunedin), 70 (Lord Shaw) and 75 (Lord Wrenbury). Such onus the applicant has totally failed to discharge. It is in this respect (as also in the fact that we have here no express prohibition) that the present case differs most strongly from *Noble's case* (1), in which Viscount Maugham expressed the

(1) [1940] A.C. 583.
(2) [1926] A.C. 377.
(3) [1927] A.C. 59.

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opinion of the House when he said: "There is no "suggestion that he (the workman) deviated from the "safe route to fulfil any purpose of his own. He was "still on the respondents' premises and was going "about his allotted job. The *necessary inference* is "that he was walking along the line (when the accident "occurred) 'for the purposes of and in connection "'with his employer's trade or business.'" No such inference naturally arises from the facts of the present case.

For these reasons the applicant fails, and the appeal must be dismissed with costs.

BABINGTON, L.J.

BABINGTON, L.J.: I concur.

At the outset of the appellant's argument it was suggested that in some undefined manner sub-section (2) of section 1 of the Workmen's Compensation Act (Northern Ireland), 1927, has enlarged the scope of the words "arising out of and in course of the employ-"ment" in sub-section (1), and thrown the onus of proof upon the employer.

This argument could only be sustained by assuming that the accident arose out of and in course of the workman's employment and by treating the act by which he met his death as being an act done in contravention of an implied regulation which is quite untenable, for as Lord Wright says in *Noble v. Southern Railway Co.* (1), at p. 601, the questions arising under section 1 sub-section (2) "do not need to be considered "until the Judge has found that the accident did arise "out of and in the course of his employment."

This, therefore, was the issue before the Recorder, the onus being upon the workman to establish it affirmatively, and the Recorder having found in favour of the employer his finding must stand if there is evidence to support it.

This is not a case of a workman doing his work negligently, but one in which the workman is said to have stepped outside his work and to have done a dangerous and unnecessary act unconnected with it and not arising out of his employment. In my opinion no

(1) [1940] A.C. 583.

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question of law emerges from a review of the facts, and there was ample evidence to support the Recorder's finding.

The deceased was erecting a crane in a machine-shop in Harland & Wolff's. A special scaffold or staging had been erected for his use. He had already erected seven similar cranes and must have known that there was no reason for him to go higher than the staging. Nevertheless, he proceeded to climb on to a beam above the staging carrying an overhead crane which was being operated while he was standing on this beam and was there killed.

What took him to the place of the accident is unknown, but it was no part of his work to go there, and it was dangerous.

This evidence is amply sufficient to sustain the Recorder's finding that the accident did not arise out of the man's employment.

MURPHY, L.J.

MURPHY, L.J.: I agree. Counsel on both sides have exercised commendable restraint in the citation of cases, but in considering the authorities I am reminded of the words of Christian, L.J., in *Greene v. Greene* (1), at p. 637 (a case relating to an, alleged, precatory trust in a will): "I will not undertake the "hopeless task of attempting to reconcile the author-"ities. Bewilderment rather than enlightenment "would, I fear, attend upon any effort to find a path "through the tangle of decisions by which the subject "is encompassed."

I would, respectfully, adopt the observations of Lord Wright in *Noble v. Southern Railway Co.* (2), at p. 600: "I have often reflected with sadness that the "Act was intended to be administered with as little "technicality as possible. Yet thousands of reported "cases have accumulated round it and fresh ones are "likely to go on accumulating so long as the Act "remains in its present form. Most of these cases in "truth depend on questions of fact, yet in *Lancashire* "*and Yorkshire Railway Co. v. Highley* (3), Lord

(1) I.R. 3 Eq. 629.
(2) [1940] A.C. 583.
(3) [1917] A.C. 352, 359.

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"Finlay, L.C., wisely observed that 'a finding of "'fact in one case cannot be a safe guide as to a "'finding of fact in another case.' The fundamental "and initial question in every claim under the Act "must be whether the accident arose out of and in "the course of the employment. That is a question "of fact which can only be decided by the County "Court Judge by applying his common sense and his "knowledge of industrial conditions to the evidence "before him, though with due regard to any principles "laid down by the Courts."

In the present case the learned Recorder's finding is that there was no evidence to show that the accident arose out of the employment; it was not necessary to consider whether or not the accident arose in the course of the employment and I shall not express any opinion on this question, but having regard to an argument of Mr. Campbell based on the definition given by Lord Atkinson in *St. Helen's Colliery Co. v. Hewetson* (1), at p. 71, it is to be observed that by their answer the respondents stated generally that the deceased was not injured by accident arising out of and in the course of his employment.

The material evidence was given by Alexander Irvine, examined for the applicant, and James Bryce, for the respondents. Irvine said: "We were erecting "platers' cranes . . . Davidson said would go and "take measurements of supporting post. . . It was "easy to get from staging to where deceased was. . . "I gathered up my tools and went into shed, when I "came back I was told my mate was crushed in "crane. . . We had erected seven cranes before this "one, this was the same as the rest. He never was "up on the beam before. We used the staging for the "rest of the cranes. That was the sensible thing to "do. A trestle ladder leads to scaffold about 22 feet "from the ground—no measurements necessary above "that. . . He was in a dangerous place without any "need for him being there."

James Bryce produced the plans and photographs and described the nature of the work of the deceased.

(1) [1924] A.C. 59.

As a result of his explanations and from his evidence it appeared that the "longitudinal rail" on which the travelling crane (which struck the deceased) ran was 10 feet above the "scaffold." Bryce also said: "Deceased had no occasion to mount to this rail for "the purpose of the work he was engaged at . . . the "ladder served the rail from the ground not the "scaffold, and one had to step across a gap to reach "it from the scaffold. He was an experienced work-"man. I cannot see how he could be helped in his "work by going up above to this rail. I know of no "reason at all why he should go to rail for marking "the place for the bracket."

Neither before the Recorder nor before us was any suggestion made on behalf of the applicant of any purpose connected with his work which would have explained the fact that the deceased climbed up to this longitudinal rail, while, equally, the respondents did not suggest any reason for this curious climb.

Sub-section (2) of section (1) of the Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 George V., c. 16) was referred to by the applicant's counsel before the Recorder, and Mr. Campbell before us said that "I can't lose sight of sub-section 2," but the Recorder dealt with the case as within sub-section (1), and I think that he was clearly right in this, because I do not see how any of the conditions enumerated in sub-section 2 can be said to have been present; the three conditions in the sub-section have been precisely explained by Lord Dunedin in *Wilson's and Clyde Coal Co. v. McFerrin* (1), at p. 386. If the case could have been brought within sub-section (2), the applicant would have had to discharge the onus of proving that the act of the deceased in climbing on to this rail was done by him for the purpose of and in connection with the respondent's trade or business. (*Garrallan Coal Co. v. Anderson or Devlin* (2)).

Was, then, the Recorder entitled to find that there was no evidence to show that the accident arose out of the employment? I think that on the evidence he was clearly justified in so finding. Mr. Campbell

(1) [1926] A.C. 377. (2) [1927] A.C. 59.

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prayed in aid the presumption laid down by Fletcher Moulton, L.J., in *Astley v. R. Evans & Co.* (1), at p. 1044. It is interesting to notice that throughout the speeches in the House of Lords in that case (2) this presumption is only referred to in the dissenting speech of Lord Atkinson, who expressly desired to guard himself against being supposed to concur in it, while Lord Loreburn says at p. 678 : " The applicant must " prove his case. This does not mean that he must " demonstrate his case."

I doubt if any such presumption applied to the facts of the present case, but if it would so apply in the absence of evidence, it appears to me that it is negatived by the evidence of Irvine and Bryce, to the salient features of which I have referred. Mr. Campbell argued that the Recorder's decision " cuts clean " across " the cases of *McWilliam v. Great North of Scotland Railway Co.* (3), and *Seviour v. Somerset Collieries* (4). I do not agree.

In the former case Lord Dundas says : " He was " performing his duty in an indiscreet and wrong " manner, but still he was performing it," and Lord Mackenzie says : " he was doing his proper work and " was not doing anything for purposes of his own " ; while in the latter case Goddard, L.J., says : " What " one has to do is to see what the man was employed " to do—find what the contract of employment was, " and what he was employed to do, and then see " whether he was doing something he was not em- " ployed to do at all, or whether he was doing what " he was employed to do in a way in which he had " been forbidden to do it."

In the present case there was no evidence that in climbing up to this rail the deceased was " performing " his duty," " doing his proper work," or " doing " what he was employed to do " ; the evidence, in fact, negatives any connection between the climb up to the rail and any work which the deceased was engaged to do. As I have already said, the evidence does not

(1) [1911] 1 K.B. 1036.
(2) [1911] A.C. 674.
(3) [1914] S.C. 453.
(4) 56 T.L.R. 437 ; 33 B.W.C.C. 62.

prove affirmatively that in so climbing the deceased was engaged in a "frolic of his own," but the negative evidence given appears to me to be fatal to the applicant's case.

In *Rigling v. Minister of Munitions* (1), the English Court of Appeal held that there was sufficient evidence to support the inference of the County Court Judge that an accident arose out of the employment of a deceased workman, but both Lord Sterndale, M.R., and Scrutton, L.J., emphasized that it was a doubtful case. There is nothing to indicate that the County Court Judge might not have properly drawn the contrary inference.

In *Smith v. Stanton Ironworks Company Collieries, Ltd.* (2), a lad was employed to control a motor by means of a switchboard 18 feet from the motor. It was also his duty when so ordered to clean the motor when it was stationary. The motor was fenced off. Without known reason he left the switchboard, got through the fence when the motor was in motion, and was killed. The County Court Judge held that the applicant had not discharged the onus of proving that the accident arose out of and in the course of the lad's employment, and the Court of Appeal (Cozens Hardy, M.R., Buckley and Hamilton, L.JJ.) held that "there are enough facts known to justify the inference "that the accident did not arise out of the employ- "ment, or even within the ambit of the workman's "duty."

The facts in *Millers v. North British Locomotive Co., Ltd.* (3), which are set out with characteristic precision in the case stated by the Sheriff Substitute, resemble in some respects those in the present case, and it is interesting to notice that before the Court of Session, as here, there was an application to have the case remitted for further evidence. In *Millers' case* (3), the deceased workman had left the floor of the yard where he should have been waiting until he got the signal for duty and had climbed on to a crane in the "heavy bay" where, like the unfortunate Davidson,

(1) 14 B.W.C.C. 1.
(2) 6 B.W.C.C. 239.
(3) [1909] S.C. 698.

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he was "jammed" by a moving crane and killed. Miller had himself charge of two cranes in the middle bay, but he had no duties to perform on the cranes in the heavy bay and his presence on the crane where he was killed "was quite unaccounted for." The Sheriff Substitute found that the claimants (the widow and children) "on whom the onus lay, had failed to "prove that the accident arose out of and in the course "of the deceased's employment." and he assoilzied the respondents. This decision was affirmed by the Court of Session who also refused to remit the case for further evidence.

I desire to express my respectful agreement with all that my Lord Chief Justice has said with regard to the "propositions" numbered 4 and 5 in *Willis*, 33rd Edition, dealing with the onus of proof in this class of case.

I should also add that the decision and judgment of the majority of the Irish Court of Appeal in *Sheehy v. Great Southern and Western Railway Co.* (1) are based on facts which differ, *toto caelo*, from the facts of the present case.

Solicitor for the appellant : *W. K. Gibson.*
Solicitors for the respondents : *C. & H. Jefferson.*

J. McC.

(1) 47 I.L.T.R. 161.

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June 5, 24.

Insurance—Motor Car—Third party risks—Insurance against death or bodily injury of third parties—Insurance by same policy against damage to property of third parties—Breach of condition in policy for maintenance of car in efficient condition—Liability of insurer to owner of damaged property—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, (20 & 21 Geo. 5, c. 24), sec. 7—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, (24 & 25 Geo. 5, c. 15), secs. 15, 18, 20.

The plaintiff sued the defendant for damages caused to his pony and trap by the negligent driving on the public highway of the defendant's motor car, and obtained judgment for damages and costs, but was unable to obtain payment from the defendant of any part of the amount.

By a policy issued by the Z. Company the defendant was insured for the purposes of Part II. of the Motor Vehicles and Road Transport Act (Northern Ireland), 1930, as amended by the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, by that company against liability for damages payable in respect of the death or bodily injury of third parties caused by the motor car, and by the same policy was insured against liability for damages payable in respect of injury to property caused by the car. The policy contained a condition that the defendant should take all reasonable steps to maintain the motor car in efficient condition; the defendant broke this condition and the accident was caused by the breach. Under the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, sec. 20, and Statutory Regulations made under that Act, the condition in the policy was of no effect in connection with claims in respect of any liability incurred by the insured by reason of the death of, or bodily injury to, any person caused by the use of the motor car on a public highway.

On an application by the plaintiff under the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, sec. 18, for an order against the Z. Company for payment to the plaintiff of the amount due under the judgment.

Held, that the plaintiff was not entitled to such order.

The facts are stated in the judgment.

Chambers, K.C., and *Sheil* for the plaintiff :—

When a policy has been issued for the purposes of the Motor Vehicles and Road Transport Acts (Northern

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Ireland), 1930 and 1934, section 18 of the Act of 1934 is wide enough to extend to all liabilities covered by the policy, and to confer on injured third parties the right to relief conferred by it, even when those parties' rights are in respect of damage to property against which the owner of a car is not obliged to insure.

Fox, K.C., and *Copeland*, for the Zurich General Accident and Liability Insurance Company, Limited :—

Relief is provided by section 18 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, only in cases in which the liability in respect of which the judgment is obtained is a liability against which the owner, or other person using the car, is obliged by law to insure. Voluntary insurance is altogether outside the scope of the Act. Liability for damage to property is not a liability for which the owner of a car is insured by a policy issued for the purposes of Part II. of the Act of 1930, as amended by the Act of 1934, and is not within section 18 of the Act of 1934.

[They referred to *Brady v. Brady* (1), and *Gray v. Blackmore* (2).]

Andrews, L.C.J.

Andrews, L.C.J. : On 23rd May, 1939, an accident occurred as a consequence of which the plaintiff's pony and trap were damaged by a motor car, the property of the defendant, which at the time of the accident was being driven by her son, John Fox. In due course a writ of summons was issued ; and on 26th October, 1940, judgment was obtained against the defendant for the sum of £70 with costs to be taxed. A writ of *fieri facias* was issued on foot of the judgment, to which a return of "*nulla bona*" was made ; and the full sum of £122 19*s.* 2*d.* for damages and costs still remains due and payable by the defendant to the plaintiff.

The defendant was insured by the Zurich General Accident and Liability Insurance Company, Ltd., against third party risks, and contemporaneously with the issue of the Writ of Summons a notice of such

(1) [1938] I.R. 103. (2) [1934] 1 K.B. 95.

proceedings was served upon that company in pursuance of the provisions of section 18 of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (hereinafter referred to as "the Act of 1934") and of Order 54c, rule 1, of the Rules of the Supreme Court; and this is an application by motion on notice for an order against the Company to pay to the plaintiff the sum payable under the judgment. No question arises as to the form or regularity of the proceedings, but an important issue was raised in the arguments before me in regard to the Company's liability.

The plaintiff's claim is based on the Policy of Insurance which was issued by the Company to the defendant covering the period of one year from 26th April, 1939. By such policy the Company agreed, subject to the terms, exceptions and conditions contained therein, to indemnify the insured in the event of accident caused by or through or in connection with the Ford motor car therein mentioned (which was the car involved in the accident) against all sums, including costs and expenses, which the insured should become legally liable to pay in respect of (*a*) death of or bodily injury to any person except as therein mentioned; and (*b*) damage to property as therein mentioned. It is admitted that by the terms of the policy the indemnity which it contains extends, subject as therein mentioned, to the authorised driver of the car. The policy contains certain General Exceptions to the Company's liability, which are immaterial for the purposes of the present case, and also certain General Conditions, number 4 of which is that "the insured "shall take all reasonable steps to maintain in efficient "condition any motor car described in the schedule "hereto and the Company shall have at all times free "access to examine such motor car." This general condition has a direct bearing upon the facts of this case, as on the independent and uncontradicted evidence of Constable King I am satisfied that at the time of the accident both the hand lever and pedal brakes were out of order and completely useless, failing entirely when applied to affect in any way the speed or course of the car. I am further satisfied on

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the evidence that the defective condition of the brakes was in no way caused by, or the result of, the accident, but that it existed prior to and that it in fact was the main, if not, indeed, the sole cause of the accident. Inefficiency of brakes of the serious character established in this case could not reasonably have developed without warning in a moment of time immediately preceding the accident. It must have been known, if not to the insured personally, at least to her authorised driver and agent, John Fox; yet the car was not stopped to enable the necessary adjustments or repairs to be effected, but was driven on until the accident occurred. A summons against John Fox for offences under section 1 of the Act of 1934 resulted in a conviction and a fine of £2, a further summons for driving with deficient brakes being marked "Ruled in the other case." In all these circumstances I have no hesitation in holding that the insured was guilty of a breach of the condition of the policy to take all reasonable steps to maintain the car in efficient condition. This disposes of the second and subsidiary point made by plaintiff's counsel, Mr. Chambers, in the able and interesting argument which he addressed to me.

I pass now to the principal point which was argued, and which may justifiably be described as novel, inasmuch as it has not been the subject of any direct and binding authority to be found in the Reports. The question is whether the plaintiff is entitled to claim the benefit of the provisions of section 18 of the Act of 1934, and to obtain an order against the insurer for payment of the amount of the judgment, in a case in which that judgment was obtained in respect of damage to property which was the subject of purely voluntary insurance, as distinguished from a case in which the judgment represented the damage sustained as the result of death or bodily injury, in respect of which the legislature by Part II. of the Acts of 1930 and 1934 imposed the obligation of compulsory insurance.

Now, in regard to this issue counsel's arguments may be summarized thus. Mr. Chambers, for the

plaintiff, contended that when once a policy had been taken out to comply with the provisions of the Act, section 18 is wide enough to extend to all liabilities covered by the policy, and to confer upon an injured third party who has obtained a judgment the right to relief conferred by section 18 even though that judgment was in respect of a liability for damage to property against which the defendant, as owner or driver, need not have insured. "Anything," he said, "in the policy in respect of which cover was obtained "falls within section 18 and enables me to enforce the "remedy." On the other hand, Mr. Fox, on behalf of the Company, submitted that the form of relief provided by section 18 applies only to cases in which the judgment was obtained in respect of a liability against which the owner or driver was compelled by the Act to insure. Voluntary insurance, he contended, was altogether outside the scope of the Act; and a plaintiff who has obtained an unsatisfied judgment in respect of damage to property is not entitled to the remedy provided by section 18.

The first point to be determined in my opinion is the validity, so far as a claim for damage to property is concerned, of the condition to which I have referred in regard to the maintenance of the motor car in efficient condition. Would the defendant's breach of this condition constitute an answer to any such claim as she, the insured, might make against the Company under the policy? In my opinion this question must receive an affirmative answer. At common law the Company is entitled to impose any condition as to its liability which it chooses, and this continues to be the present state of the law save in so far as it is affected by the Acts of 1930 and 1934.

What then is the scope and operation of these Acts so far as relates to the present case? They impose by section 7 (*b*) compulsory insurance in respect of liability for the death of or bodily injury to any person caused by or arising out of the use of a motor car on a public highway; but they impose no obligation whatever to insure in respect of liability arising from injury to the property of such person, as, for example, to his

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pony and trap. The Acts further provide by section 7 (1) (*c*) against the inclusion in a policy of any condition, restriction or limitation which shall not be inserted in a policy issued for the purposes of Part II. of the Act. The reference in this sub-section to conditions, etc., which shall not be inserted in a policy is to section 20 of the Act of 1934, the terms of which are so important that I set out the relevant portions *in extenso.*

> "If in any policy . . . issued . . . for the "purposes of Part II. of the Act of 1930 as amended "by this Act, there is inserted any condition . . . which is prescribed as a condition . . . which shall "not be inserted in such a policy . . ., such con- "dition shall be of no effect in connection with such "claims as are mentioned in paragraph (*b*) of sub- "section (1) of section 7 of the Act of 1930, as "amended by this Act."

Here in very definite terms the legislature has declared the invalidity in a policy issued "for the purposes of "Part II. of the Act" of any such condition as is there referred to; but such invalidity is expressly limited to such claims as are mentioned in section 7 (1) (*b*), i.e., to death or bodily injury claims. It follows inferentially that such a condition would be binding and would be given full effect to in so far as it related to other claims than those specified, as, for example, the claim for damage to property with which we are concerned in the present case.

Such conditions as are referred to in section 20 were "prescribed" by clause 7 of the Motor Cars (Third Party Risks) (Northern Ireland) Regulations, 1934, made by the Ministry of Home Affairs for Northern Ireland, and one of them was a condition with regard to "the condition of a vehicle." Condition 4 in the defendant's policy with the Company is therefore clearly a "prescribed" condition; and, accordingly, if in regard to the liability in the present case the policy is held to have been "issued for the purposes "of Part II. of the Act" (as it certainly would be if the liability was in respect of death or bodily injury) the condition is not valid or binding. If, on the other

hand, it is not so held, then the condition was properly inserted in the policy and is valid in respect of any claim arising from such liability.

Was the policy in this case "issued for the purposes "of Part II. of the Act"? In my opinion the answer to this question is both in the affirmative and in the negative. It was partly for the purposes of the Act, and partly not. The answer should be affirmative in so far as the policy provided an indemnity in respect of a death or bodily injury claim; it should be negative in so far as it provided a purely voluntary insurance in respect of a liability for damage to property. In truth, the policy is of a composite twofold character. The real purpose of this Part of the Act was the provision of compulsory insurance in respect of a liability of a defined and limited character which did not extend to or include liability of the character on which the plaintiff claimed and recovered judgment in this case. As there was no obligation to insure in respect of this latter liability it would in my opinion be an abuse of language to say that *qua* that liability the policy had anything whatever to do with the purposes of Part II. of the Act. One might fairly compare the present case with one which appears to me to be analagous. The proviso to section 7 enacts that such a policy (i.e., a policy to comply with the requirements of the Act) shall not be required to cover liability in respect of (amongst other things) the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy. If, notwithstanding such right of exemption, the policy in fact covered liability in the case of the death of such employee, could it be seriously argued that this was a liability for which the owner was insured by a policy issued "*for the purposes* of Part II. "of the Act"?

Another sub-section may be usefully referred to in this connection—section 7 (4)—which provides that a policy shall be of no effect *for the purposes* of this Part of the Act unless and until a certificate of insurance has been delivered by the insurer in the prescribed form. Here again this statutory requirement, or, as

K.B.D. 1941.

McPherson v. Fox.

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I may call it, this condition precedent to liability, is in my opinion properly confined by the express language of the section to the liability under the policy which arises in consequence of the statutory compulsory insurance. The failure to deliver such certificate would not, and, as it seems to me, should not affect the insured's right to indemnity arising from a provision for voluntary insurance even though such provision was contained in the same policy.

The validity of a condition ought not to depend on the fact that two separate and distinct insurances—one without and one within the Act—are conveniently embodied in the same document in order to avoid unnecessary and undesirable duplication of policies. If the twofold insurance in the present case had been effected by two separate policies—one of voluntary and the other of compulsory insurance—instead of by the composite form of policy which was adopted, the plaintiff could have had no possible claim against the Company under the section in respect of his present judgment. It would be strange, indeed, if Parliament intended to prejudice the position of a company which for sake of convenience embodied a double form of insurance in one document. In my opinion, however, the Legislature did not effect such an anomalous result. On the contrary it deliberately employed words which avoided it. A valid condition in respect of insurance against a particular form of liability does not become invalid merely because it happens to be contained in a document which also embraces insurance against another form of liability in respect of which it is not valid.

I would like to contrast the phraseology "issued "*for the purposes* of the Act," which compels me to look at the objects for which the policy was required by the Act, with the words "issued *under* the section" or "issued *under* . . . the Act" which will be found in substituted section 7 (3) and section 12 of the Act of 1930, respectively. I must assume that the change in language was deliberate. The word "under" was in my opinion used in section 7 (3) to give the section greater width and a more extended application so as

to embrace "*any* liability which the policy purports "to cover," and in section 12 to give full effect to the principle underlying the insurer's liability for the expenses of hospital treatment. My views upon this latter section will be found fully set out in my judgment in *The Royal Victoria Hospital v. The London Guarantee and Accident Corporation, Ltd.* (1), and need not be repeated. Both forms of insurance—compulsory and voluntary—may be contained in a policy issued "under" the Act; but it is only in respect of compulsory insurance that one can properly speak of a person being insured by a policy issued "for the "purposes of" the Act.

I, accordingly, hold that, so far as the plaintiff's claim in this action is concerned, the condition is a valid and binding one. It would constitute a complete answer to any claim which the defendant, Rose Fox, might make upon the Company under the policy; and the plaintiff, who is, as it were, subrogated to her rights by section 18 (1), has no higher or better claim against the Company in respect of the recovery of his judgment.

For the reasons which I have stated the plaintiff has, in my opinion, failed to bring his claim within the provisions of section 18 (1) of the Act of 1934; and the motion must, accordingly, be refused with costs.

Solicitor for the plaintiff: *J. G. Lennon.*

Solicitor for the Zurich General Accident and Liability Insurance, Co., Ltd.: *H. J. Catchpole.*

J. McC.

(1) [1937] N.I. 64.

C.A. 1940.

RODDY v. CORPORATION OF LONDONDERRY.

April 29. May 9.

Master and Servant—Wages—Payment otherwise than in current coin—Deductions for cost of transport to and from place of work—Thing done or provided by employer in relation to the work—Proceedings for recovery of sums deducted—Truck Act, 1831 (1 & 2 *Wm.* 4, *c.* 37)—*Truck Act*, 1896 (59 & 60 *Vic.*, *c.* 44).

The plaintiff and other men were employed by the defendants to work at some distance from L. where they lived; it was a term of the contract of employment that any man who should be transported by the defendants to and from L. and the place of his work should pay a specified sum to the defendants for each day on which he was so transported, and should agree to the deduction by the defendants of those sums from the wages payable each week. The plaintiff was so transported and the specified sums were deducted from his wages each week. The defendants made no profit from the transport. More than six months after the date of the last deduction the plaintiff sued the defendants for the amounts so deducted.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ):—

1. That the sums deducted from wages were not dealt with by the defendants in such a way as to amount to payment of them to the plaintiff within the provisions of the Truck Act, 1831.
2. That the transport of the plaintiff to and from the place of his work was a thing done or provided by the defendants in relation to his work within the meaning of the Truck Act, 1896, sec. 3, sub-s. 1, and that the proceedings were unsustainable under sec. 5 of that Act.

Case Stated by Megaw, J., on the hearing of an appeal from a decision of the Recorder of Londonderry dismissing a civil bill brought by the plaintiff claiming £28 15*s.* 0*d.* for wages due by the defendants.

The following are the material facts found in the Case Stated:—

The plaintiff who lived in Londonderry was employed by the defendants to work as an unskilled labourer at the construction of waterworks some miles away. He was employed on written "Terms of Engagement "of Workmen," which were known to him, one of which was that unskilled labourers from Londonderry

should be paid 46*s.* 0*d.* per week, and another of which was that men transported to and from the site of the works by the defendants should pay to the defendants certain specified sums for each day on which they were so transported, and should agree to the deduction by the defendants of those sums from the wages payable each week. The plaintiff and other men employed by the defendants were transported to and from the site of the works by omnibuses hired and paid for by the defendants, and the sums specified in the "Terms "of Engagement of Workmen" as payable in respect of transport were deducted from the plaintiff's wages each week; the defendants made no profit by the transport of the plaintiff or the other workmen. The standard rate of wages for unskilled labourers in Londonderry at all material times was 44*s.* 0*d.* per week. It was not proved that particulars in writing showing the things in respect of which the deductions were made, or the amount of the deductions, were ever supplied to the plaintiff. The plaintiff sued for the amount of the deductions from his wages in respect of transport; the proceedings were not commenced within six months from the date of the last deduction.

The question reserved was whether the plaintiff was entitled by virtue of the Truck Acts, 1831—1896, to recover the sums deducted from his wages.

Chambers, K.C., and *McVeigh* for the plaintiff:—

The deductions from wages were illegal under the Truck Act, 1831, extended to Ireland by the Truck Amendment Act, 1887 (50 & 51 Vict., c. 46, sec. 18); there is nothing to take the case out of the general words of sec. 4 of the Truck Act, 1831. In cases within the Truck Act, 1831, deductions from wages are not permissible except such as are expressly sanctioned: *Williams v. North's Navigation Collieries, Ltd.* (1). It is only sums deducted contrary to the Truck Act, 1896, proceedings for the recovery of which must be brought within six months from the date of

(1) [1906] A.C. 136.

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the deduction. They referred to *Glasgow v. Independent Printing Co.* (1).

Lowry, K.C., Warnock, K.C. and *Grant* (for *Nicholson* on war service) for the defendants :—

What has been done with the sums which make up the amount sued for amounts to payment in the current coin of the realm. The deductions were made to carry out a purpose which had the plaintiff's approval and which he wished to have fulfilled, and all the sums deducted were applied in payment of the hire of the omnibuses : *ex parte Cooper. In re Morris* (2). Bowen, L.J., said in *Hewlett v. Allen* (3), " it could not " be right that a workman should sanction the handing " over of his contributions to a fund created for his own " benefit and the benefit of others and years afterwards " recall his contributions." The plaintiff has acquiesced in the deductions and the application of the sums deducted and cannot complain of what has been done with his knowledge and tacit consent : *Hewlett v. Allen & Sons* (3) at p. 671. The transport of the plaintiff was a thing done or provided by his employers in relation to his work or labour, within the Truck Act, 1896, sec. 3, sub-s. 1, and the proceedings not having been commenced within six months from the date of the last deduction, are unsustainable under sec. 5 of that Act.

Cur. adv. vult.

MURPHY, L.J.

May 9.

MURPHY, L.J., delivered the judgment of the Court as follows :—

Edward Roddy by civil bill dated 6th September, 1938, sued the Londonderry Corporation claiming £28 15*s.* 4*d.* as the balance of wages due by the Corporation to him and, alternatively, as " money " wrongfully and illegally deducted from the wages " payable by defendants to plaintiff and in breach " of the Truck Acts." It appears that Roddy was employed on the Banagher Water Scheme as a labourer

(1) [1901] 2 I.R. 278.
(2) 26 Ch.D. 693.
(3) [1892] 2 Q.B. 662.

from the 28th May, 1928, to 9th August, 1929, at Killaloo, and afterwards from 8th August, 1932, to 12th October, 1934. The Banagher Water Scheme consisted of the construction of a reservoir in the hills at a considerable distance from the city of Londonderry and of a pipe line to convey the water from this reservoir to the city; this pipe line passed through the district of Killaloo. Roddy obtained this employment through the Londonderry Labour Exchange, under an "Em- "ployment Scheme," and the "Terms of Employ- "ment of Workmen" (a copy of which was sent to the Labour Exchange) were known to him; according to the finding of Megaw, J., Roddy came under clause 1 (*a*) of these "Terms," and as an unskilled labourer from the city of Londonderry his wages were 46*s.* 0*d.* for a week of 48 hours. By clause 3, men "transported "to and from the site of the work by the employers" (as Roddy was) were to agree to deductions from their wages at different rates according to the time of year, and by clause 4 men were to travel "in their own time" to and from the site of the dam or other part of the work. Roddy says that "deductions were made of "bus fares each week," but, while he clearly agreed at the time to these deductions, he never signed any agreement for any deduction. The Corporation hired buses from outside contractors for the transport of their workmen, and, as is found in the case stated, made no profit from this transport. Stimulated in all probability by the decision of Wrottesley, J., in *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.* (1), Roddy instituted proceedings, as stated, by civil bill, and it is agreed that the amount claimed is the sum total of the weekly deductions for "transport"—indeed in our Court counsel for the Corporation stressed the point that Roddy had furnished exact particulars of these deductions as showing his knowledge of the terms of employment and the actual amount deducted under these terms. The learned Recorder of Londonderry dismissed the civil bill, an appeal was taken from his decision, and on hearing the civil bill appeal at the Londonderry City Assizes, Megaw, J., stated a case

(1) [1938] 2 K.B. 51.

C.A. 1940.

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for our decision. The second point, as to the effect of the Public Authorities Protection Act, 1893, was abandoned by Mr. Lowry, K.C., the leading counsel for the Corporation, and therefore, having regard to the decision of the House of Lords in *Pratt v. Cook, Sons & Co. (St. Paul's), Ltd.* (1), this claim of Roddy, however stale, is not barred by any Statute of Limitation. The unmeritorious character of Roddy's claim cannot, of course, affect his legal rights.

On behalf of Roddy, Mr. Chambers argued, persuasively, that the plaintiff was entitled to succeed under section 4 of the Truck Act, 1831, as the sum sued for was part of his wages which had not been paid to him "in the current coin of this realm." As against this, Mr. Lowry and Mr. Warnock contended that, on the authorities, what had been done with the moneys which made up the amount sued for, amounted to a payment to the plaintiff in the current coin of this realm, and that, alternatively, the Corporation were entitled to deduct these moneys and so to defeat this claim. In the case it is found that the wages of the plaintiff were 46*s.* 0*d.* a week, and it does not appear to us that the effect of this finding is qualified (for the purposes of the case) by the finding as to the "intention" with reference to 2*s.* 0*d.* out of this wage of 46*s.* 0*d.* Unless, therefore, there is something to take the case out of the general words of section 4 of the Truck Act, 1831, the plaintiff would be entitled to succeed. The terms of employment which, it is found, were known to the plaintiff, explicitly provide for *deductions* from this weekly wage in connection with the transport of workmen from the city of Londonderry to the places on the line of works at which they were engaged, and Mr. Chambers argues that the decision of the House of Lords in *Williams v. North's Navigation Collieries* (2), establishes that such deductions are not permitted by the Truck Act of 1831. This decision, it will be noticed, did not deal with a claim to set-off, but it is a clear authority for the proposition that (in cases within the Truck Act) when an employer seeks to make *deductions* from wages

(1) 56 T.L.R. 363. (2) [1906] A.C. 136.

" earned by or payable to " his employee against the consent of the employee, such deductions are only permissible if they are *expressly* sanctioned by the Truck Act, 1831. Lord Davey in his speech at page 142 of the report says : " Bowen, L.J., stated the exact point " in *Hewlett v. Allen* (1), when, commenting on the " third section, he said that payment in account will " not do and that the employer cannot for the purpose " of compliance with the statute be both payer and " payee, while, on the other hand, he held that set-off in " an action was only prohibited in the cases mentioned " in section 5." The decisions in *Glasgow v. Independent Printing Co.* (2), *Penman v. Fife Coal Co.* (3), and *Kenyon v. Darwen Cotton Manufacturing Co.* (4), are all illustrations of the same principle. In *Penman's case* (3), Lord Macmillan, at p. 56, adopted the words of Bowen, L.J., already referred to : " The employer " cannot be . . . both payer and payee " and said : " In the present case the retention was for the em- " ployer's own benefit, and it is a cardinal object of " the Truck Act to prevent the employer from making " deductions from his workmen's wages in his own " interest." He also points out (at page 55) that the principle upon which the House of Lords proceeded in *Hewlett v. Allen* (5), was that a debtor discharges his debt to his creditor when he pays the creditor's creditor on his creditor's instructions.

In the present case the Londonderry Corporation hired buses to convey the workmen from the city to their work, and the amount deducted from the wages of the workmen was less than the amount paid by the Corporation for such hire. We are of opinion that the Corporation could not be held to have acted as agents for the workmen in so hiring buses—although the workmen were, no doubt, interested in having transport facilities thus provided—and that as the Corporation were solely liable for payment of the hire, the sums deducted from the wages of the workmen went in reduction of the amount for which the Corporation were liable, and that the Corporation in making these

(1) [1892] 2 Q.B. 662, 666.
(2) [1901] 2 I.R. 305.
(3) [1936] A.C. 45.
(4) [1936] 2 K.B. 193.
(5) [1894] A.C. 383.

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deductions were therefore payers *and* payees. They were not paying creditors of the workmen on the instructions of the workmen nor were they "placing "the money in the hands of some person in whose "hands the person employed desired it to be placed" within the meaning of the words used by Lord Herschell in *Hewlett v. Allen* (1), at page 389. In fact the deductions in the present case were in respect of something provided by the employers in relation to the work of the workman, namely, transport to and from his work, and therefore within the prohibition contained in section 3 (1) of the Truck Act, 1896. They were not deductions in respect of a liability of the workmen for something not relating to his work, the discharge of which by the employers could be said to be payment to the workmen in current coin of the realm. We are, therefore, of opinion that the moneys claimed by the plaintiff which were from time to time deducted from his wages were never dealt with in such a way as would amount to a payment to him within the provisions of the Truck Act, 1831.

On their second line of argument, counsel for the Corporation relied on the provisions of the Truck Act, 1896 (59 & 60 Vic., c. 44). They argued that until this Act was passed the "contracts for deductions" which are specified in sections 1, 2 and 3 were permissible, that the provision of transport to the work would come within the words "any other thing to be "done or provided by the employer in relation to "the work or labour of the workman" in section 3 (1) of the Act, and that if the contract for the deductions in the present case was prohibited because the terms of section 3 were not complied with, the present claim of the plaintiff is unsustainable because of the period of limitation prescribed by section 5 of this Act.

We think that the Act of 1896 does show that, notwithstanding the general words used in sections 3 and 4 of the Truck Act, 1831, and the limited number of "exceptions to the generality of the law" (I quote the words of the marginal note as giving a convenient description) contained in section 23 of that Statute, *contracts* for deductions of the nature specified in

(1) [1894] A.C. 383.

sections (1), (2) and (3) of the Truck Act, 1896, would have been permissible prior to the passing of that Act, and that since the Act of 1896 was passed these *contracts* were only permitted if the requirements of these sections had been complied with. We are also of opinion that the terms of engagement show that transport from and to the city of Londonderry was to be provided, for city workmen, by the Corporation and that such transport was a "thing to be done or "provided by the employer in relation to the work "or labour of the workman." The terms of engagement are also evidential of a parol contract between Roddy (as one of the city workmen) and the Corporation for deductions from his wages in respect of this transport. There is no evidence that the terms of section 3 (2) (*b*) were complied with (though we agree with Mr. Lowry that the particulars furnished by Roddy do suggest that particulars in writing of these deductions were *at some time* supplied to him), but assuming that the Corporation cannot prove that all the terms of section 3 were complied with, the limitation period of six months, prescribed by section 5 of this Act, appears to us to apply.

The Act of 1896 was not referred to in *Williams v. North's Navigation Collieries* (1), for there, as pointed out by Lord Atkinson in his speech at page 145, the master was "withholding . . . from the workman ". . . a portion of the wages earned by the latter "*against his consent.*" If this case negatives the legality of *all* deductions except those expressly sanctioned by the Truck Act, 1831, we cannot see how such a decision could be consistent with the provisions of the Truck Act, 1896.

On this ground we are of opinion that the first question submitted to us in the Case Stated should be answered in the negative. The Corporation are entitled to their costs of the case stated which we measure at fifteen guineas.

Solicitor for the plaintiff: *A. Robb.*
Solicitor for the defendants: *Humphrey Babington.*

(1) [1906] A.C. 136.

J. McC.

Ch. D.
1941.

July 7.

DUFFY v. DUFFY.

Will—Construction—Estate to be divided as sole executor thinks fit—Absence of trust—Whether executor entitled beneficially.

Testatrix by her will appointed her brother her sole executor and directed him to pay her debts and funeral and testamentary expenses · the will then proceeded : " I wish the above executor to " take charge of all my affairs, and to divide my estate as he thinks " fit."

Held, that the executor took the estate of the testatrix as a beneficiary, or was donee of a general power of appointment over it.

ORIGINATING SUMMONS.

Sydney Irvine Duffy made her will, dated 5th March, 1939, in the following words :—

" I appoint my brother, Robert Duffy, of Wincroft,
" Kincora Avenue, and
" of to be the
" executor of this my will. I direct my executor
" to pay my just debts and funeral and testamentary
" expenses. Until my recovery or in the event of
" my death, I wish the above executor to take
" charge of all my affairs, and to divide my estate
" as he thinks fit."

The testatrix died on 18th April, 1940, and on 10th June, 1940, probate of the will was granted to Robert Duffy, the plaintiff. The estate of the testator consisted of personal property valued at more than £12,000.

The summons was taken out by the executor to determine whether upon the true construction of the will the estate of the testatrix—

(1) Was held by the plaintiff as donee of a general or limited power, or
(2) Was held by the plaintiff in trust for the next-of-kin of the testatrix, or
(3) Belonged to the plaintiff beneficially.

Beattie, *K.C.*, and *Belford* for the plaintiff :—

The testatrix left the estate to the plaintiff without any restriction on his power of disposal. There is no trust expressed or necessarily to be implied. The plaintiff is entitled to the estate beneficially. *In re Howell* (1).

In *Yeap Cheah Neo v. Ong Cheng Neo* (2), *Fenton v. Nevin* (3), and *Balfe v. Halpenny* (4), it was held that the executors held on trust for the next-of-kin, in the present case there is only one executor and he the brother of the testatrix.

[He also referred to *In re Chapman* (5).]

Ellison, K.C., for the next-of-kin :—

There are no words of gift to the executor but only directions which impose duties upon him. The words " as he thinks fit " refer to the taking charge of the testatrix's affairs as well as to the division of her estate, and the sentence is a direction in a lay person's language to administer the estate as the executor thinks fit. The direction to divide is inconsistent with a gift to the executor, or any power of appointment which would enable him to appoint to himself alone. No general power of appointment can have been intended, because if the testatrix intended that the executor should do as he wished with the property she would have bequeathed it to him. If she intended to give him a special power of appointment she failed to do so because she did not specify the persons, or class of persons, in whose favour the power might be exercised.

In *in re Howell* (1), the testator directed that the residue should be at the discretion of the executor and at his own disposal ; one of the definitions of " disposal " in the Oxford Dictionary is " power or " right to deal with as one pleases." In *Fenton v. Nevin* (3), Fitzgibbon, L.J., said : " I think that an " executor cannot distribute assets for his own benefit ; " whatever he is bound as executor to distribute he

(1) [1915] 1 Ch. 241.
(2) L.R. 6 P.C. 381.
(3) 31 L.R.I. 478.
(4) [1904] 1 I.R. 486.
(5) [1922] 2 Ch. 479.

Ch.D. 1941.

DUFFY v. DUFFY.

"cannot keep for himself. Where there is no gift to "him, and no third parties are mentioned, though "the testator intended to give him a discretion to "select whatever objects he might think fit, that "discretion is controlled by the disability to select "himself arising from the trust in him to select others." A gift of the residue is more naturally made by uncertain words than a gift of the whole estate, especially an estate worth £12,000.

MEGAW, J.

MEGAW, J.: Apart from case law on reading the will I formed the opinion that the clear intention of the testatrix was to give testatrix's brother—her executor—absolute control over the disposal of her estate at his discretion. The only direction in the will was a direction to pay debts and funeral and testamentary expenses, a necessary duty of an executor. She goes on to give him full power to deal with her estate, without any suggestion of next-of-kin being beneficiaries. Apparently in legal phraseology this was a general power of appointment, in no way restricting her executor from taking the residue after payment of debts, &c., for his own beneficial interest. I do not think there is any trust for the next-of-kin arising either from the words of the will or implication of law.

Mr. Ellison, however, referred me to the case of *Fenton v. Nevin* (1), decided by the Irish Court of Appeal where Fitzgibbon, L.J., in his judgment, held in a rather analogous case that a gift by will enured for the benefit of the next-of-kin of a testator, based on the position that the executor was to be considered a trustee, and could not appoint to himself. However, I was referred to a subsequent decision of the English Court of Appeal, *in re Howell*, in which *Fenton v. Nevin* (1) was cited, and the Court in that case which is certainly very similar in its facts to the present, held that the executor took the residuary estate of the testator as a beneficiary and not as a trustee for the next-of-kin.

While neither of these cases is binding on our

(1) 31 L.R.I. 478.

Northern Ireland Courts, I accept the latter as being a later unimpeached judgment and consistent in principle with my own opinion as to the effect of the will before me; and I am of opinion that whether as the donee of a general power of appointment which the plaintiff may exercise for his own benefit, or as beneficiary, the plaintiff has, or can lawfully create, an absolute estate in the residue for himself.

Solicitor for the plaintiff: *F. J. Orr & Co.*
Solicitors for the defendant: *Johnstone & Walkington.*

M. W. G.

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INSURANCE—MOTOR CAR—THIRD PARTY RISKS—INSURANCE AGAINST DEATH OR BODILY INJURY OF THIRD PARTIES—INSURANCE BY SAME POLICY AGAINST DAMAGE TO PROPERTY OF THIRD PARTIES—BREACH OF CONDITION IN POLICY FOR MAINTENANCE OF CAR IN EFFICIENT CONDITION— LIABILITY OF INSURER TO OWNER OF DAMAGED PROPERTY—*Motor Vehicles and Road Traffic Act* (*Northern Ireland*), 1930 (*20 & 21 Geo. 5, c. 24*), *sec. 7*— *Motor Vehicles and Road Traffic Act* (*Northern Ireland*), 1934 (*24 & 25 Geo.*

5, c. 15), *secs.* 15, 18, 20. The plaintiff sued the defendant for damages caused to his pony and trap by the negligent driving on the public highway of the defendant's motor car, and obtained judgment for damages and costs, but was unable to obtain payment from the defendant of any part of the amount. By a policy issued by the Z. Company the defendant was insured for the purposes of Part II. of the Motor Vehicles and Road Transport Act (Northern Ireland), 1930, as amended by the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, by that company against liability for damages payable in respect of the death or bodily injury of third parties caused by the motor car, and by the same policy was insured against liability for damages payable in respect of injury to property caused by the car. The policy contained a condition that the defendant should take all reasonable steps to maintain the motor car in efficient condition; the defendant broke this condition and the accident was caused by the breach. Under the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, sec. 20, and Statutory Regulations made under that Act, the condition in the policy was of no effect in connection with claims in respect of any liability incurred by the insured by reason of the death of, or bodily injury to, any person caused by the use of the motor car on a public highway. On an application by the plaintiff under the Motor Vehicles and Road Transport Act (Northern Ireland), 1934, sec. 18, for an order against the Z. Company for payment to the plaintiff of the amount due under the judgment. *Held*, that the plaintiff was not entitled to such order. *McPherson v. Fox* .. K.B.D. 163

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MASTER AND SERVANT—NEGLIGENCE—LIABILITY OF A. FOR NEGLIGENCE OF HIS SERVANT EMPLOYED UNDER THE CONTROL OF B.—DANGEROUS OBJECT—PETROL—SMOKING—SCOPE OF EMPLOYMENT. By a policy of insurance the Northern Ireland Road Transport Board was indemnified by the C. Insurance Company against loss or damage caused by the use of a certain motor lorry its property, including the loading and unloading thereof, provided that the C. Insurance Company should not be liable in respect of injury or damage caused beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the lorry for loading thereon, or the taking away of the load from it after unloading. Under an agreement with H. M. D. the Transport Board was bound to deliver petroleum spirit for H. M. D. by tank lorries which were to be loaded at H. M. D.'s installation at L., or such other place as H. M. D. should direct, to keep at L. sufficient lorries to transport such petroleum spirit, to keep it insured while in transit against fire and spillage, to dress all their employees engaged in such delivery in such uniforms and liveries as H. M. D. might direct, and under the said agreement all employees of the applicants engaged in or about the said delivery were to accept and obey the orders of H. M. D. or their representatives regarding such delivery, the payment of accounts and all matters incidental thereto, provided that nothing therein contained should be taken as meaning or implying that such employees of the Transport Board were in any way the employees of H. M. D., and the Transport Board was to be responsible to H. M. D. for all losses which H. M. D. might sustain through any tort, misdemeanour, negligence or default of which any of its employees might be guilty. On 2nd August, 1937, the lorry driven by D., received 300 gallons of petrol at H. M. D.'s installation at L. for delivery into the storage tank of J. C. at B. D. drove the lorry to B. backed it into C.'s garage, inserted the nozzle of the delivery hose into the manhole of C.'s tank, turned on the stop-cock at the side of the lorry, and the petrol began to flow into the tank; D., while the petrol was flowing, lit a cigarette and threw the match on the floor of the garage. The match ignited some material on the floor and a fire started forthwith where the nozzle of the hose was discharging into the tank; D. drove the lorry out of the garage; when the fore-wheels had reached the water-channel in the street he stopped the lorry and jumped off it, The fire had pursued the trailing hose and the escaping petrol, and an explosion occurred which destroyed

the lorry and also a motor car which was standing in the street, and damaged eleven houses; the motor car and the houses were the property of third parties. Differences arose between the Transport Board and the C. Insurance Company as to the liability of the Company to make good the losses sustained by reason of the damage done to the lorry and to the motor car and to the houses, and the matters in dispute were referred to arbitration. The arbitrator stated certain questions of law which arose in the course of the reference, in the form of a special case for the determination of the Court. *Held* (1) that D. at the time when the accident happened was acting as servant of the Transport Board; (2) That the act of D. in lighting a cigarette and throwing the match on the floor of the garage amounted, in the circumstances, to negligence within the course of his employment for the consequences of which his master was responsible; (3) That the damage to the property of the third parties was, in the circumstances, caused by the use of the motor lorry, including the loading and unloading thereof, within the meaning of the policy. *Northern Ireland Road Transport Board v. Century Insurance Co., Ltd.* .. C.A. 77

MASTER AND SERVANT (2)—WAGES—PAYMENT OTHERWISE THAN IN CURRENT COIN—DEDUCTIONS FOR COST OF TRANSPORT TO AND FROM PLACE OF WORK—THING DONE OR PROVIDED BY EMPLOYER IN RELATION TO THE WORK—PROCEEDINGS FOR RECOVERY OF SUMS DEDUCTED—*Truck Act*, 1831 (1 & 2 *Wm.* 4, *c.* 37)—*Truck Act*, 1896 (59 & 60 *Vic.*, *c.* 44). The plaintiff and other men were employed by the defendants to work at some distance from L. where they lived; it was a term of the contract of employment that any man who should be transported by the defendants to and from L. and the place of his work should pay a specified sum to the defendants for each day on which he was so transported, and should agree to the deduction by the defendants of those sums from the wages payable each week. The plaintiff was so transported and the specified sums were deducted from his wages each week. The defendants made no profit from the transport. More than six months after the date of the last deduction the plaintiff sued the defendants for the amounts so deducted. *Held*, by the Court of Appeal (Andrews L.C.J., Babington and Murphy, L.JJ.): 1. That the sums deducted from wages were not dealt with by the defendants in such a way as to amount to payment of them to the plaintiff within the provisions of the Truck Act, 1831. 2. That the transport of the plaintiff to and from the place of his work was a thing done or provided by the defendants in relation to his work within the meaning of the Truck Act, 1896, sec. 3, sub-s. 1, and that the proceedings were unsustainable under sec. 5 of that Act. *Roddy v. Londonderry Corporation.* C.A. 172

NEGLIGENCE—DANGEROUS STRUCTURE—INJURY TO CHILD—LIABILITY OF OWNER—TRESPASSER OR LICENSEE The plaintiff, a boy aged about 12 years, was injured as a result of climbing on a structure erected by the defendants to carry their electric cables, and catching a cable which was charged with electricity. The structure consisted of two upright poles with cross bars connecting them; one of the poles stood on a public laneway and the other on an adjoining field separated from the laneway by a broken fence through which it was easy to enter the field. Under statutory regulations it was the duty of the defendants to have on the structure a danger notice and to make adequate provision to prevent climbing; no sufficient danger notice was on the structure and no adequate provision was made to prevent climbing. The adjoining land was used by children as a playground and children played on the structure, but not to the knowledge of the defendants. The plaintiff had no express permission to play on or to climb, the structure. In an action for damages for negligence. *Held*, by the Court of Appeal (Andrews, L.C.J., and Murphy, L.J.) (Babington, L.J., dissenting), that the defendants were not liable because the plaintiff was a trespasser and climbed at his own risk, and also because he was guilty of contributory negligence. Per Andrews, L.C.J.: The statement in the headnote to the Report of *Excelsior Wire Rope Company, Ltd. v. Callan* [1930] A.C. 404 that "The immediate danger "being apparent it was not material "whether the children were or were "not trespassers," is not supported

by any of the speeches of the Law Lords, and is misleading. *McLaughlin v. Antrim Electricity Supply Co.* C.A. 23

PRACTICE——COMMITTAL ORDER—ORDER XLIV, RULE 4—INSTALMENT IN ARREAR—COSTS OF COMMITTAL ORDER—*Debtors Act (Ireland)*, 1872. The Court when making an order for committal to prison under the Debtors Act (Ireland), 1872 (35 & 36 Vict., c. 57), sec. 6, may make the payment of the creditor's costs of the application to commit a condition precedent to the debtor's discharge. *Allam, Ltd. v. Kayes.* [K.B.D. 110

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WILL—CONSTRUCTION—ESTATE TO BE DIVIDED AS SOLE EXECUTOR THINKS FIT—WHETHER EXECUTOR ENTITLED BENEFICIALLY. Testatrix by her will appointed her brother her sole executor and directed him to pay her debts and funeral and testamentary expenses; the will then proceeded: "I wish the "above executor to take charge of all "my affairs, and to divide my estate "as he thinks fit." *Held*, that the executor took the estate as a beneficiary, or was donee of a general power of appointment over it. *Duffy v. Duffy.* .. .. .. Ch.D. 180

WORKMEN'S COMPENSATION (1) —REFUSAL TO UNDERGO SURGICAL OPERATION—RIGHT TO FURTHER COMPENSATION—*Workmen's Compensation Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 16), *sec.* 9 (1). A workman was injured by accident in the course of his employment as a joiner and in consequence suffered pain in standing, by reason of which he was totally incapacitated for work. Two eminent surgeons advised him to undergo a certain operation which would make his ankle joint stiff, but which in their opinion would if successful, relieve the pain and enable him to do all the work of a joiner, and if unsuccessful would not make him any more incapacitated for work than he was. The workman's surgeon was of the opinion that if the operation were successful it would relieve the pain and enable the workman to do the greater part of the work of a joiner, but that its success was doubtful, and he advised the workman not to undergo it. Such an operation was the only remedy and it was not a serious operation. The workman refused to

undergo the operation, and the employers, who had thitherto paid compensation, discontinued the payment. *Held*, that the workman acted unreasonably in refusing to undergo the operation, and that he was not entitled to an award of compensation. *Steele v. Robert George & Company (1937), Ltd.* .. .. C.A. 133

WORKMEN'S COMPENSATION (2) —CONTRACT OF SERVICE MADE IN NORTHERN IRELAND WITH EMPLOYER RESIDENT THERE—INJURY TO WORKMAN IN EIRE—JURISDICTION—PAYMENT OF COMPENSATION BY EMPLOYER — WAIVER — ESTOPPEL — *Workmen's Compensation Act (Northern Ireland)*, 1927. By an agreement made in Northern Ireland the applicant was employed by the respondent who resided in Northern Ireland to do certain work in Eire. The applicant was injured by accident arising in the course of his employment in Eire. The respondent paid the applicant as compensation the sums to which he would have been entitled if he had been within the Workmen's Compensation Act (Northern Ireland), 1927, for fifteen months except one week during which he employed him ; he then again employed him ; eventually he discharged him and refused to pay any further compensation. The applicant applied to the Recorder of Belfast to settle by arbitration under that Act the question of the liability of the respondent to pay compensation. *Held*, that the Recorder of Belfast had no jurisdiction to deal with the matter. *Held, also*, that the jurisdiction of a County Court Judge under the Workmen's Compensation Act (Northern Ireland), 1927, cannot be enlarged by the conduct of either of the parties. *Cash v. Rainey* .. .. C.A. 52

WORKMEN'S COMPENSATION (3) —ACCIDENT—"ARISING OUT OF AND "IN THE COURSE OF THE EMPLOY-"MENT"—ONUS OF PROOF—*Workmen's Compensation Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 16), *sec.* 1, *sub-ss.* 1 & 2. A workman in the course of his employment with the respondents had to mount a scaffold and, when on it, mark the position for a bracket. About 10 feet above the scaffold there was a beam on which a crane travelled ; from the ground to the beam there was a ladder which could easily be reached from the scaffold by stepping across an open space. The workman went up to the beam, and when he was on it the crane crushed him, causing fatal injuries. He had no occasion to go up to the beam for the purpose of the work on which he was engaged, and there was no evidence to show why he did so. The widow of the workman applied for compensation. *Held*, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.):—1. That the applicant had not discharged the onus which was on her of proving that the accident arose out of and in the course of the workman's employment. 2. That the accident was not to be deemed under the Workmen's Compensation Act (Northern Ireland), 1927, sec. 1, sub-sec. 2, to have arisen out of and in the course of the workman's employment. *Davidson v. Harland & Wolff, Ltd.* .. C.A. 147